EXHIBIT A

State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

February 24, 2017

TO: **Stephen Journeay, Director**
Commission Advising and Docket Management
William B. Travis State Office Building
1701 N. Congress, 7th Floor
Austin, Texas 78701

Courier Pick-up

RE: **SOAH Docket No. 473-16-1861**
PUC Docket No. 45280

Compliant of Extenet Network Systems, Inc. Against the City of Houston for Imposition of Fees for Use of Public Right of Way

Enclosed is the Proposal for Decision on Part One of Bifurcated Hearing (PFD) in the above-referenced case. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no deadline in this case. Please notify the undersigned Administrative Law Judges and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,

Wendy K. L. Harvel
Administrative Law Judge

Travis Vickery
Administrative Law Judge

Enclosure
xc: All Parties of Record

300 W. 15th Street, Suite 504, Austin, Texas 78701/ P.O. Box 13025, Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.475.4994 (Fax)
www.soah.texas.gov

217

SOAH DOCKET NO. 473-16-1861
PUC DOCKET NO. 45280

COMPLAINT OF EXTENET NETWORK SYSTEMS, INC. AGAINST THE CITY OF HOUSTON FOR IMPOSITION OF FEES FOR USE OF PUBLIC RIGHT OF WAY	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

I. INTRODUCTION 1

II. JURISDICTION AND NOTICE 2

III. PROCEDURAL HISTORY 3

IV. LAW AND POLICY BACKGROUND 4

A. Chapter 283 4

1. Certificated Telecommunications Provider 5

2. Access Lines 8

3. Base Amount 10

B. Chapter 283 Conclusions 13

V. PRELIMINARY ORDER ISSUE NO. 1 15

A. Facilities at the "Node" 16

B. Facilities Extending from the Node 17

C. Ownership of Facilities 18

VI. PRELIMINARY ORDER ISSUE NO. 2 18

A. Is ExteNet Providing Backhaul Service? 18

1. The Definition of "Backhaul" and Description of ExteNet's Backhaul Service 19

2. The Commission was Aware of Backhaul for Wireless Providers in Project No. 20935 21

3. Preliminary Order Issue No. 2 Does Not Inquire as to the Impact of Classifying ExteNet's Services as Backhaul 25

4. ExteNet's Service is Backhaul, Not Interoffice Transport 26

5. The Function of ExteNet's Equipment is to Provide Backhaul Service .. 28

6. The ExteNet/Verizon Contract Contemplates Backhaul Service 29

7. The City's Position is Inconsistent with the Intent of Chapter 283 30

B. Is ExteNet Providing Commercial Mobile Radio Service? 31

C. Is ExteNet Providing Other Services Through its Facilities? 35

VII. PRELIMINARY ORDER ISSUE NO. 3 38

A. Chapter 283 Applies to ExteNet 38

B. Parties' Arguments 41

1. Regardless of its Status as a Contractor to CMRS Providers, ExteNet's is still a CTP 41

2. ExteNet is a CTP Despite the Fact that it Does Not Provide LETS 42

3. Chapter 283 Does Not Require ExteNet's Backhaul to Qualify as an Access Line Before it is Covered 45

VIII. CONCLUSION 46

IX. FINDINGS OF FACT 46

X. CONCLUSIONS OF LAW 49

XI. ORDERING PARAGRAPHS 50

SOAH DOCKET NO. 473-16-1861
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COMPLAINT OF EXTENET NETWORK SYSTEMS, INC. AGAINST THE CITY OF HOUSTON FOR IMPOSITION OF FEES FOR USE OF PUBLIC RIGHT OF WAY	**§**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION ON PART ONE OF BIFURCATED HEARING

I. INTRODUCTION

ExteNet Network Systems, Inc. (ExteNet) filed a complaint with the Public Utility Commission of Texas (Commission) against the City of Houston (City or Houston) complaining that the City could not charge ExteNet franchise fees for placing equipment in the City's public right of way. ExteNet contends that it is entitled to place its equipment in the right of way without being subject to a franchise fee because it is a Certificated Telecommunications Provider (CTP) and subject to the provisions of Texas Local Government Code (Local Government Code) chapter 283 (Chapter 283). Chapter 283 exempts CTPs from municipal franchise fees and subjects CTPs to a state-wide regulatory scheme wherein each CTP is assessed a fee based on the number of access lines it has in a city's public right of way. Furthermore, because ExteNet only provides backhaul service,[1] which is not considered an access line, ExteNet contends it is not required to pay any fees under Chapter 283. Staff and the City disagree.

This case presents the situation of technological innovation moving faster than the law, an increasingly common occurrence. Staff and *amici* express concern that any final decision should only apply to this case only and should not seek to reclassify new technology into a statutory scheme that does not currently address the technology.[2] *Amici* suggest that the Commission open a rulemaking proceeding to address the technology. Chapter 283 foresaw that

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[1] The parties dispute whether the service ExteNet provides should be considered backhaul. That issue is discussed in Section VI of this Proposal for Decision (PFD).

[2] The following entities filed *amicus* briefs or statements at various times during the proceeding: Texas Coalition of Cities and Texas Municipal League, Texas Cable Association, Level 3 Communications, LLC, Zayo Group, LLC, Crown Castle NG Central LLC, Comcast Phone of Texas, City of San Antonio, and TEXALTEL.

changes in technology or the market would likely require the Commission to review the definition of "access line" and established a mechanism whereby the Commission was directed to do so at least every three years.[3]

The Administrative Law Judges (ALJs) find that ExteNet's services fall within the scope of Chapter 283. Because ExteNet is a CTP providing backhaul service, ExteNet is not required to have a franchise agreement with the City, nor is it subject to the access line fees as established in Chapter 283. ExteNet's customers, Commercial Mobile Radio Service (CMRS) providers, already pay the City for their use of the right of way, and ExteNet's backhaul service is part of what is already covered in the CMRS providers' franchise agreements.

II. JURISDICTION AND NOTICE

The City contests the Commission's jurisdiction over this matter. The City asserts that the Commission does not have jurisdiction under Chapter 283 over an entity that is not a CTP. Staff and ExteNet disagree with the City and assert that the Commission has jurisdiction over this case.

The ALJs find that the Commission has jurisdiction. ExteNet is a CTP providing backhaul, and as such, is under the Commission's jurisdiction. How ExteNet provides backhaul within the context of Chapter 283, and thus is subject to the Commission's jurisdiction, is addressed throughout this Proposal for Decision (PFD). The Commission is charged with enforcing the provisions of Chapter 283 and with promulgating rules and reviewing those rules every three years to ensure that the rules adjust to current technology and market conditions.

No party disputes notice and those issues are addressed in the findings of fact and conclusions of law without discussion.

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[3] Tex. Local Gov't Code § 283.003.

III. PROCEDURAL HISTORY

The procedural history is undisputed. ExteNet filed its complaint on October 23, 2015, contending that the City should not be permitted to impose fees on ExteNet for use of its right of way. Staff and the City filed motions to dismiss. ExteNet filed a request to certify the main legal issue in this proceeding to the Commission.[4] Staff did not oppose the certification if the Commission ALJ decided not to dismiss the case. The case was not dismissed, and the Commission did not decide the certified issue. Staff's and City's Motions to Dismiss were carried with the case, and are denied with the issuance of this PFD.

On January 13, 2016, the Commission issued an Order of Referral, referring the case to the State Office of Administrative Hearings (SOAH). The Commission subsequently requested briefing on the threshold legal issue of whether Chapter 283 applies to a CTP that installs a wireless distributed antenna system (DAS) in the public right of way, including fiber optic cables and an antenna. The Commission concluded the statute was ambiguous and referred that issue and others to SOAH. The case is bifurcated, and this PFD addresses the first three issues from the Commission's Preliminary Order.[5] Once a final order is issued on this portion of the case, the parties will propose a schedule for the second phase of the proceeding, if one is needed. The hearing convened on October 4, 2016, and concluded on October 5, 2016. The record closed on December 29, 2016, with the filing of proposed findings of fact and conclusions of law.

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[4] The issue certified to the Commission was Preliminary Order Issue No. 3.

[5] Although this case is bifurcated, the PFD necessarily touches on Preliminary Order Issue No. 4, which asks what appropriate municipal right of way fees Houston may charge ExteNet.

IV. LAW AND POLICY BACKGROUND

A. Chapter 283[6]

The main purpose of Chapter 283 is to facilitate competition between all wholesale and retail providers of Local Exchange Telephone Service (LETS) while also establishing "a uniform method of compensating municipalities for the use of the public right-of-way."[7] The legislative deregulation of the local exchange telecommunications industry took place in Texas in 1995,[8] followed closely by federal deregulation in 1996.[9] Prior to deregulation, local exchange carriers (LECs) operated as local area monopolies. At the beginning of deregulation, the incumbent local exchange companies (ILECs) had various market advantages over the competitive local exchange companies (CLECs) that were attempting to enter the market.[10] One of the advantages that ILECs enjoyed included more favorable franchise agreements with cities for access to rights of way. In 1999, the 76th Texas Legislature enacted Chapter 283 to eliminate the anticompetitive practices resulting from such municipal-level franchise agreements.[11] Chapter 283 accomplished this by replacing the required city-by-city franchise agreements with a state-level regulatory regime that applies equally to both ILECs and CLECs.

By applying a state-level regulatory scheme, the legislature removed the uncertainty of separate franchise fee agreements having to be negotiated between providers and cities. The statute lists its policy goals: to encourage competition, reduce the barriers to entry for providers so that the number and types of services offered by providers continue to increase through

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[6] As explained at the hearing on the merits, in the interests of judicial economy, the ALJs have borrowed directly from the parties' briefing in drafting this PFD.

[7] Tex. Local Gov't Code § 283.001(c).

[8] H.B. 2128, Acts of 1995, 75th Leg. Ch. 231, (PURA 1995), recodified in the Title 2 of the Utilities Code, Public Utility Regulatory Act, Subtitle C, Telecommunication Utilities; *see also*, City of Houston (COH) Ex. 3 at 11.

[9] Federal Telecommunications Act of 1996, 47 U.S.C. § 151 (1996).

[10] *See generally* Staff Initial Brief at 25; Tex. Local Gov't Code § 283.001(c).

[11] COH Ex. 3 at 15-17.

competition, ensure that providers did not obtain a competitive advantage or disadvantage, and fairly reduce the uncertainty and litigation of franchise fees.[12]

1. Certificated Telecommunications Provider

To enact the stated policies under Chapter 283, the legislature defined who was covered by the statute and defined a CTP as "a person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the commission to offer local exchange telephone service or a person who provides voice service."[13] A CTP was then exempted from franchise agreements and city-level regulation and subject to a fee established under Chapter 283. "Notwithstanding any other law, a certificated telecommunications provider that provides telecommunications services within a municipality is required to pay as compensation to a municipality for use of the public rights of way in the municipality only the amount determined by the commission under Section 283.055."[14]

ExteNet holds Service Provider Certificate of Operating Authority (SPCOA) No. 60769 granted by the Commission in 2006.[15] ExteNet is certificated to offer LETS as evidenced by the Notice of Approval.[16] The Notice of Approval also specifies that ExteNet has committed to adhere to the service quality standards applicable to LETS.[17] The Notice of Approval authorizes ExteNet to offer LETS.

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[12] Tex. Local Gov't Code § 283.001(a).

[13] Tex. Local Gov't Code § 283.002(2).

[14] Tex. Local Gov't Code § 283.051(a).

[15] *Application of ExteNet Systems, Inc. for a Service Provider Certificate of Operating Authority*, Docket No. 33365 Notice of Approval (Nov. 17, 2006).

[16] COH Off. Not. Ex. 18; COH Ex. 28, *Application of ExteNet Systems, Inc. for a Service Provider Certificate of Operating Authority*, Docket No. 33365, Notice of Approval (Nov. 17, 2006).

[17] COH Ex. 28 at 6.

Although ExteNet is a CTP with approval to offer LETS, it does not provide that service. Instead, it provides backhaul through a DAS. The City argues that ExteNet should not be considered a CTP because it does not provide LETS. The statute, however, does not distinguish between CTPs that provide LETS and those that do not. ExteNet argues that it is a CTP for purposes of Chapter 283, regardless of the type of service it provides. The City argues that the Commission has interpreted Chapter 283 to exclude CTPs that provide services such as cable or wireless, or are interexchange carriers; and the Commission has indicated that compensation from those providers would be outside the scheme of Chapter 283.[18] Thus, the City argues that ExteNet is similar to those types of providers and should be excluded from CTP coverage under Chapter 283.

Staff argues that ExteNet's interpretation of the CTP definition is too narrow. Although Staff agrees that ExteNet holds an SPCOA, Staff notes that once a provider is issued an SPCOA, the provider is directed to use the certificate expeditiously pursuant to 16 Texas Administrative Code § 26.111(j). Staff further notes that any certificate holder that has not provided service for 12 months must file an affidavit annually indicating that it maintains the required technical and financial services necessary to provide service.[19] As an enforcement mechanism, the Commission may hold a hearing to suspend or revoke the certificate if the certificate holder has not provided service within 24 months of being granted the certificate.[20] Staff asserts that these rules show that an entity must provide LETS or risk losing its certificate.

The ALJs find that ExteNet is a CTP under Chapter 283. As explained by ExteNet's witness Diane Barlow, H.B. 1777 was intended to apply to all CTPs, regardless of whether those CTPs provided telecommunications services over landlines or wireless.[21] Ms. Barlow testified that during the negotiations regarding H.B. 1777, it was clear that all CTPs, even those providing

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[18] *See* COH Ex. 3 at 16-17.

[19] 16 Tex. Admin. Code § 26.111(j)(1).

[20] 16 Tex. Admin. Code § 26.111(j)(2).

[21] ExteNet Ex. 6 at 13.

only wireless services, would be included as a CTP.[22] Furthermore, the statute's plain language does not differentiate between classes of CTPs and does not create an exception for an entity that is a CTP not providing LETS.[23] The legislature could have carved out exceptions to the definition of CTP in the statute, but it did not. The ALJs decline to read into a statute an exception that was not included when the statute was written.

Certainly, the Commission has, by order, specifically interpreted Chapter 283 to exclude certain types of services, as argued by the City. But the Commission has not addressed the specific issue presented here, whether a CTP providing backhaul with a DAS system is included under Chapter 283. However, the Commission has held that a CTP not providing LETS but providing nonswitched point-to-point service is a CTP for purposes of Chapter 283.[24] The statute's plain meaning and Commission precedent results in the conclusion that ExteNet is a CTP. The ALJs further conclude that ExteNet is a CTP providing backhaul service.[25]

The ALJs also do not dispute Staff's contention that if the Commission wanted to revoke ExteNet's certificate after 24 months of not providing LETS, the Commission has that power, subject to ExteNet's due process rights. However, in the more than 10 years that ExteNet has held its SPCOA, the Commission has not taken that action.[26] If the Commission wanted to specifically exclude ExteNet's services from the framework of Chapter 283, the proper mechanism to do so would be through a rulemaking where the Commission could, as directed by statute, review changes in technology or the market to determine whether to change the definition of access line. Unless and until the Commission does so, as a CTP providing backhaul service, the ALJs find that ExteNet is a CTP for all purposes under Chapter 283.

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[22] ExteNet Ex. 6 at 13.

[23] Tex. Local Gov't Code § 283.002(2).

[24] *Complaint of Metromedia Fiber Network Services, Inc. Against the City of Carrollton, Texas Under the Public Utility Regulatory Act and HB 1777*, Order on Certified Issue (Sept. 28, 2001).

[25] The issue of backhaul is addressed in detail under the discussion of Preliminary Order Issue No. 2.

[26] There was no evidence presented that ExteNet is out of compliance with any of the terms of its SPCOA.

2. Access Lines

In general, the parties agree that ExteNet has no access lines. However, the parties dispute how that should affect the outcome of this case. ExteNet contends that because it has no access lines, it is not subject to fees for access lines under Chapter 283. Staff notes that with zero access lines, under the Chapter 283 methodology, ExteNet would pay no fee under Chapter 283, which Staff contends is an absurd result. Although there is no dispute that ExteNet's backhaul service should not be classified as an access line, the ALJs outline the legal background in some detail because Chapter 283 allows the Commission to change the definition of an access line and directs the Commission to review new technology and the market at least every three years to determine whether changes need to be made to the definition.

At the time it was passed, Local Government Code Section 283.055 directed the Commission to establish not more than three categories of access lines. For each city, the Commission was to set a fee to be applied to each category of access line so that each city would receive the same amount of revenue after H.B. 1777 was enacted as it had received under the franchise regime. The statute was drafted to be revenue-neutral.[27] Chapter 283 delineated three types of access lines:

> (1) switched transmission path physically within a public right of way extended to the end-use customer's premises within the municipality that allows the delivery of LETS within a municipality;
>
> (2) each termination point of a nonswitched telephone or other circuit consisting of transmission mediation within a public right of way connecting specific locations identified by and provided to the end-use customer for delivery of nonswitched telecommunications services; or
>
> (3) each switched transmission path within a public right of way used to provide central office-based PBX-type services for systems of any number of stations within the municipality.[28]

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[27] Tr. at 236-39, 248, 257.

[28] Tex. Local Gov't Code § 283.002 (1)(A); PBX means private branch exchange.

The statute further states that the definition of access line does not include interoffice transport or other transmission media that do not terminate at an end-use customer's premises. Furthermore, Chapter 283 also states that the statute may not be construed to permit duplicate or multiple assessments of access line rates for the provision of a single service.[29]

Some types of access lines were excluded from the access line count, with full knowledge that no direct compensation would be paid to cities for the excluded and uncounted lines.[30] Specifically, the statute states, "[T]he compensation paid under this chapter constitutes full compensation to a municipality for all of a certificated telecommunications provider's facilities located within a public right-of-way, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, *even though those types of lines are not used in the calculation of the compensation.*"[31]

After Chapter 283 was passed, the Commission opened a rulemaking project to implement the new law. As a result of that proceeding, certain types of lines were designated as lines not to be counted as an access line. During the process, the Commission considered input from parties on the issue of whether backhaul to wireless providers used solely for the purpose of providing wireless telecommunications services would be counted as access lines. At the conclusion of the process, the Commission decided not to count backhaul services as an access line, *without distinguishing among different types of backhaul facilities*.[32] This provision has not changed since it was adopted.[33] However, because the statute was revenue-neutral, whether the lines were counted or not, the cities still received the same total compensation as they had received under the earlier franchise-fee scheme.

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[29] Tex. Local Gov't Code § 283.002(1)(B).

[30] Tex. Local Gov't Code § 283.052(f).

[31] Tex. Local Gov't Code § 283.056(f) (emphasis added).

[32] 16 Tex. Admin. Code § 26.465(f)(2), (3).

[33] *Implementation of HB 1777*, Project No. 20935, Proposed New 26.467 Relating to Rates, Allocation, Compensation, Adjustments and Reporting as Approved for Publication at the December 16, 1999 Open Meeting (*Access Line Counting Rule Order*).

There is generally no disagreement that ExteNet has no access lines as that term is currently defined in Chapter 283 and the Texas Administrative Code. Chapter 283 defined the term "access line" when it was enacted.[34] However, the legislature anticipated that, due to changes in technology or in the market, the definition of access line might need to change and specifically gave the Commission the power to change its statutory definition.[35] Based on the testimony provided, the technology ExteNet is using (DAS) was either not used or was not widely used at the time Chapter 283 was written.[36] However, the legislature was certainly aware that new technologies would come into the market and that the market would change. Thus, the legislature enacted Chapter 283 to allow for market and technological changes, thereby avoiding potential high costs, additional fees, additional litigation, and local regulation that could serve as a barrier to entry of new participants and new technologies. As explained below, the ALJs find that ExteNet is providing backhaul service, which is not counted as an access line. If the Commission determines that backhaul service provided by a CTP to wireless carriers should be counted as an access line, a rulemaking can be opened under the statute and, after the rule is enacted, ExteNet would then be subject to the revised definition of access line and any resulting fees. However, under Chapter 283 and the current substantive rules, ExteNet is a CTP providing backhaul service, which is not compensable to the City as an access line.

3. Base Amount

H.B. 1777 replaced a system of individual city franchises with a uniform, state-wide system of fees to be paid based on access lines located in a municipal right of way. The statute was a make-whole statute; that is, the access line fees each city was to receive under the new system were intended to equal the franchise fees each city was receiving in 1998.[37] The legislature set forth how the "base amount" was to be determined: franchise, license, permit, and application fees plus in-kind services or facilities were to be included, but taxes, special

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[34] Tex. Local Gov't Code § 283.002(1).

[35] Tex. Local Gov't Code §§ 283.002(1)(A), 283.003.

[36] *See* Tr. at 206-08; ExteNet Ex. 1 at 9.

[37] Tr. at 236.

assessments and pole rental fees were to be excluded.[38] The base amount was the target; the access line fees when multiplied by the number of access lines to be counted was to equal that dollar amount for each city. To determine the base amount, each city totaled the compensation received in 1998 under its franchise agreements with CTPs.[39] After determining the base amount, each city then totaled the number of access lines and divided the total base amount by the allocated number of access lines to determine the proper fee to be assigned to each type of access line.[40]

One of the first tasks to be performed in implementing H.B. 1777 was to determine how much money in fees and in-kind services or facilities the cities received in 1998. Staff issued questions seeking comments and held a workshop before proposed Rule 26.463 was published for comment.[41] The Commission considered the comments that were filed and adopted Rule 26.463 on October 21, 1999.[42]

There have been no substantive amendments to this rule since its adoption; the base amount has never been, and was not required to be, recalculated. The determination of the base amount established the target amount of revenue each city was to receive under the new access line fee regime so that cities would be kept whole. H.B. 1777 expressly recognized that the telecommunications industry and market conditions are fluid; it authorized the Commission to address those changes through a Commission determination of "whether changes in technology,

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[38] Tex. Local Gov't Code § 283.053(a), (b).

[39] Tr. at 156-58.

[40] *Implementing HB 1777, Commission Order Adopting Rule § 26.463*, Docket No. 20935, (Base Amount Order) at 6-7 (Approved Oct. 21, 1999, signed Oct. 27, 1999). Each category of access line had a different allocation factor.

[41] *Implementation of HB 1777*, Project No. 20935, Second Set of Questions at 2-3, filed July 23, 1999. (PUC Interchange Item 37); Proposed New § 26.463 relating to Calculation and Reporting of a Municipality's Base Amount as approved for publication at the August 27, 1999 Open Meeting and Submitted to the Texas Register. (PUC Interchange Item 70).

[42] *Implementation of HB 1777*, Project No. 20935, Order Adopting new § 26.463 as Approved at the October 21, 1999 Open Meeting and Submitted to the Secretary of State.

facilities, or competitive or market conditions justify a modification" in the definition of or categories of access lines.[43]

Staff argues that although ExteNet is a CTP, it does not provide LETS or any service that contains an access line. Staff asserts that to ensure compensation paid to municipalities is not unequally born by LECs, ExteNet should compensate the City outside of the framework of Chapter 283. Staff argues that this is good policy, because as wireless technology progresses, the number of LETS access line fees paid to cities declines. Staff contends that if backhaul facilities provided to wireless carriers are included under Chapter 283, then the system may become unworkable.[44]

According to the City, ExteNet's argument ignores the reason certain transmission media do not count as access lines. The goal of Chapter 283 was to prevent the double recovery of revenue for use of a city's right of way.[45] The City asserts that, when H.B. 1777 was implemented, all revenue associated with providing backhaul was subject to a city's franchise fee ordinance. Therefore, that money was included in the base amount, which was then divided by the number of access lines. If the backhaul were counted again and subject to another fee, then a city would recover for it twice. Finally, the City argues that the Texas Constitution prohibits a city from granting use of its rights of way to a private entity for free.[46] Thus, under the Chapter 283 methodology, it is receiving compensation for backhaul because backhaul was included in the calculation of the base amount. If backhaul were specifically carved out again and included as a separate category, then the City would recover for it once under the base amount and again separately, which was not the purpose of the statute.

Both Staff and the City assert reasonable policy arguments about access lines and the loss of revenue. It is also reasonable to assert that excluding all backhaul prevented double recovery.

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[43] Tex. Local Gov't Code § 283.003.

[44] Staff Initial Brief at 20-22.

[45] City Initial Brief at 58-59, *citing* COH Ex. 3 at 20.

[46] City Initial Brief at 63, *citing* Tex. Const. Art. III, § 52(a); Tex. Const. Art. XI, § 3.

The Commission may undertake a rulemaking or establish policy regarding its interpretation of the statute. However, the facts of this case, and the current state of the law, demonstrate that ExteNet is a CTP providing backhaul service, which is not counted as an access line.

B. Chapter 283 Conclusions

The legislature anticipated that market conditions and technology would change in the field of telecommunications. To ensure that Chapter 283 remained relevant and applicable to the market, the legislature included a provision for Commission review. Under the statute, between March 1, 2002, and September 1, 2002, the Commission was required to review whether changes in technology, facilities, competitive or market conditions justified a modification in the categories of access lines, or a new definition of access line.[47] Chapter 283 directs that after September 1, 2002, the Commission must make the same determination at least once every three years.[48] Although a review is statutorily required every three years, the last time the Commission reviewed its access line rules was in 2010.[49]

Staff asserts that if ExteNet is not required to pay franchise fees, it would lead to the absurd result of ExteNet being able to use the public right of way for free, which is not what the statute intended. Staff is also concerned that the City's argument could exclude from Chapter 283 services that are currently covered. Staff contends that if the City's interpretation of backhaul is adopted, it would limit Chapter 283 by excluding more CTPs than those seeking to install DAS in the rights of way. On the other hand, Staff is concerned that if ExteNet's interpretation is adopted, it would expand Chapter 283 to include CTPs that provide backhaul facilities to CMRS carriers. Staff alleges that both interpretations would reshape the current regulatory landscape. Therefore, Staff supports an interpretation of the statute that would

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[47] Tex. Local Gov't Code § 283.003(a).

[48] Tex. Local Gov't Code § 283.003(c).

[49] *PUC Rulemaking to Revise the Definition of Access Line and the Categories of Access Lines Pursuant to Local Government Code Chapter 283*, Docket No. 37498 (Aug. 13, 2010).

exclude a CTP that does not provide LETS but provides DAS facilities that it wants to locate in a city's right of way.

The ALJs find that Staff's argument ignores the plain language of the statute, which does not distinguish between CTPs that provide LETS and those that do not. Under Staff's argument, ExteNet would be required to enter a franchise agreement with Houston and any other city where it provides DAS service, until such time as ExteNet provided LETS. Once ExteNet started providing LETS, it would then fall under the rubric of Chapter 283 and it would not be required to pay a franchise fee for its backhaul facilities. Staff's suggestion is one of policy, which is a question for the Commission to address. It is not, however, what the ALJs recommend because the plain language of the statute applies to all CTPs, including ExteNet, with no inquiry into whether a CTP actually provides LETS.

The ALJs also conclude that Chapter 283 applies to CTPs that provide backhaul. The City and Staff have questioned what constitutes backhaul and how far the term extends. Chapter 283 does not define or even mention backhaul. When the Commission was developing its implementation rules, the issue of how to distinguish backhaul for wireless providers was raised, and yet no distinction was recognized in the rules. The Commission's rules do not define backhaul, and only mention that term twice – as an exception to being classified as an access line. Considering the explicit goals and policies of the legislature, the ALJs recommend that the best approach, *in this specific case*, is to adopt an expansive view of backhaul and find that ExteNet's backhaul is covered by Chapter 283.

Because all of a city's compensation for a qualifying entity's use of its right of way is limited to one total amount, the base amount, CTPs that provide backhaul do not compensate a city for access. To avoid double-counting of fees that would be passed on to the end consumer, the law prohibits more than one fee for a single service.[50]

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[50] Tex. Local Gov't Code § 283.006(a).

Using the parties' interpretations of the law, there are two possible outcomes in this case. One is that even though ExteNet provides backhaul, it should not receive the single-fee protection of Chapter 283 because its customer, the retail provider, is Verizon Wireless (Verizon), a CMRS provider. The second outcome is that because ExteNet is a CTP providing backhaul it should be covered by Chapter 283's exception. The ALJs recommend that the latter because it is more consistent with the plain statutory language and stated purpose of Chapter 283.

V. PRELIMINARY ORDER ISSUE NO. 1[51]

ExteNet provides a wholesale DAS service to CMRS providers. This service extends from an antenna located on a utility pole back to the CMRS provider customer's hub location. DAS routes customers' cellphone calls to the CMRS provider's hub and switch to allow the CMRS provider to connect the caller to the person being called. ExteNet proposes to install equipment to perform the function of routing calls to the CMRS hub. ExteNet calls this service backhaul. It can provide this service to several CMRS providers at the same time and route the calls to the appropriate provider that would have its own equipment installed to handle its network's calls.[52]

The City disagrees with ExteNet's characterization of its service as backhaul. However, the ALJs are not addressing the parties' arguments regarding how ExteNet's services should be characterized under this Preliminary Order issue. Rather, the ALJs interpret the Commission's request under this issue as a factual inquiry, asking only what facilities will be installed. The issues of how the services should be characterized and how they fit into the regulatory scheme are addressed under Preliminary Order Issue Nos. 2 and 3.[53]

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[51] What facilities does ExteNet propose to install in the public right of way?

[52] ExteNet Ex. 2 at 7; Tr. at 70.

[53] In its Initial Brief, the City devotes pages of argument under Preliminary Order Issue No. 1 on whether ExteNet's facilities are backhaul and how they should be characterized under the existing statute and regulations. This argument was not persuasive in addressing Preliminary Order Issue No. 1, which asks for a factual discussion of the equipment being installed. The question of what kind of service ExteNet provides is addressed under Preliminary Order Issue No. 2 below.

A. Facilities at the "Node"

The term "node" refers to a collection of several facilities that are located on or adjacent to a pole.[54] The node is the antenna, which is owned by ExteNet, and is placed at a location where there is a "hot spot" of demand from wireless end users and installed with the goal of being as unobtrusive as possible.[55] It is at the node that the equipment that transmits and receives the wireless signal (the Remote Radio Head or RRH) is located.[56] The RRH is owned by a CMRS provider, not ExteNet.[57] There is also coaxial cable that carries the radio frequency signal from the antenna to the RRH.

Also located at the node is the equipment that converts the radio frequency signal to a light signal so that it can be carried over fiber optic cable, and transmits the optical signal over fiber to the CMRS provider's baseband unit at the hub.[58] Parts of the fiber optic cable, which can run long distances, are at the node.[59] The antenna and RRH are connected to a fiber patch panel that is also located at the node.[60] These items of equipment require power from the electric utility that is metered; there also may be batteries at the node to provide backup power in the event of a power outage.[61] ExteNet is a neutral host provider. Its antenna is capable of being used to provide backhaul service for several CMRS providers, each of which would have its own RRH at the node.[62] In summary, ExteNet wants to install an antenna, coaxial cable, RRH (belonging to a CMRS provider), fiber optic cable, and a fiber patch panel together as a "node."

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[54] Tr. at 75.

[55] ExteNet Ex. 1 at 6-7.

[56] ExteNet Ex. 1 at 5.

[57] Tr. at 84, 88, COH Ex. 17.

[58] ExteNet Ex. 1 at 6, 8; COH Ex. 21.

[59] Tr. at 70, 85.

[60] Tr. at 70.

[61] Tr. at 72-73; ExteNet Ex. 1 at 6, fn. 2.

[62] ExteNet Ex. 2, at 7; Tr. at 70.

B. Facilities Extending from the Node

ExteNet's service is provided using dark fiber cable that extends from the node to the CMRS provider's hub.[63] The fiber is called dark fiber because it is inert until a CMRS provider routes data through the fiber. Specifically, this dark fiber cable connects at the node (attaching to the fiber patch panel at the node) and extends to the fiber patch panel terminating at a piece of equipment called a Baseband Unit or (BBU) located at the CRMS provider's hub.[64] As ExteNet witness Michael Alt testified:

> The BBU routes the voice and data sessions to the Mobile Switching Office. The BBU also controls the operation of the RRHs connected to it. For instance, the BBU directs the RRH to adjust its signal/power strength and works with other BBUs to coordinate hand-offs between different nodes.[65]

From the node, ExteNet provides backhaul using dark fiber cable that extends from the node to the CMRS provider's hub.[66] This fiber connects to the fiber patch panel at the node, and extends from that point to another fiber patch panel at the BBU, which is located at the CMRS provider's hub.[67] The BBU routes the CMRS voice and data traffic to the Mobile Switching Office (MSO) and controls the operation of the RRHs connected to it.[68]

Although ExteNet's fiber facility ends at the BBU at the hub, and ExteNet has no direct interconnection with any telecommunications service provider beyond that point, there is no question that its service is indirectly connected.[69] If it were not, it would be impossible for a Verizon customer who is driving or walking past an ExteNet node to make or receive calls and

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[63] ExteNet Ex. 1 at 6-7.

[64] Tr. at 77.

[65] ExteNet Ex. 1 at 8.

[66] ExteNet Ex. 1 at 6.

[67] Tr. at 77.

[68] ExteNet Ex. 1 at 8.

[69] ExteNet Ex. 1 at 5, 9; ExteNet Ex. 2 at 7; ExteNet Ex. 4, at 13-14; COH Ex. 34; Tr. at 163-64.

communicate with landline customers of AT&T (or any other telephone company) in Houston, or anywhere else.

C. Ownership of Facilities

ExteNet provides service that is leased to CMRS providers. Certain items of equipment at the node will be owned by the CMRS provider but maintained by ExteNet.[70] ExteNet's facilities are designed to be leased to CMRS carriers. A CMRS carrier would own the RRH, the cable connecting the RRH to the one of the ExteNet-owned fiber patch panels, and the fiber optic cable connecting the fiber patch panel to the CMRS carrier's BBU.[71] ExteNet owns the antenna and the fiber patch panel. Because the entire configuration works together, ExteNet would maintain it.

VI. PRELIMINARY ORDER ISSUE NO. 2[72]

In response to Preliminary Order Issue No. 2, the ALJs find that ExteNet is providing backhaul service for wireless providers. ExteNet, however, is not a wireless provider, nor is it providing CMRS. Although ExteNet, through its fiber, could offer point-to-point service on a wholesale basis in a configuration that does not include a node, it does not currently offer that service.

A. Is ExteNet Providing Backhaul Service?

ExteNet argues that it is providing backhaul service to Verizon, as a neutral host provider – meaning that other carriers can use its service. Staff agrees with ExteNet that the service it provides is backhaul, but Staff argues that ExteNet's definition of backhaul is unreasonable and does not fall within Chapter 283. The City disagrees that ExteNet is providing backhaul because

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[70] Tr. at 119.

[71] COH Ex. 15.

[72] What services will ExteNet provide through use of these facilities?

the company's services do not meet the definition of interoffice transport. The City offers a number of other arguments, based on the equipment ExteNet uses, the claim that ExteNet is only a contractor to Verizon, and that ExteNet's service is actually CMRS. As explained below, the ALJs find that ExteNet is providing wholesale backhaul service for wireless providers.

1. The Definition of "Backhaul" and Description of ExteNet's Backhaul Service

At the simplest level, the term "backhaul" describes transmission facilities that connect a wireless provider's cell towers to the wireless provider's switch.[73] ExteNet witness Joseph Gillan explained that, "backhaul is commonly understood to refer to the transport of traffic from an antenna site 'back to' a wireless carrier's switching/routing facility," where it is handed off to the CMRS provider for routing.[74] In the case of ExteNet, the company describes its service as unswitched, dedicated point-to-point transport services to its customers, CMRS providers. Specifically, the service transports "data and information from . . . the antenna, all the way back through to the BBU" at the CMRS provider's hub over dark optic fiber.[75]

In his testimony, Mr. Gillan relied on the following definitions of backhaul from Newton's Telecom Dictionary:

> Backhaul: As a verb, backhaul means to carry traffic from the service edge toward the core network; for example, from a cellular tower toward a mobile operator's core network, or from an earth station or cable-landing station to the service provider's point of presence in a carrier hotel or other collocation facility.
>
> Backhaul: As a noun, backhaul is the portion of a telecommunications network that links the service edge to the service provider's core network. An example of backhaul is the portion of a cellular operator's network that connects a cell site

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[73] *Implementation of HB 1777*, Project No. 20935, Joint Comments on Proposed Rule § 26.465 Counting Access Lines filed by City of Austin, *et al.* (Cities) and Coalition of Cities at 3 (filed Oct. 28, 1999) (PUC Interchange Item 149); and Comments of Texas Municipal League (TML) at 1 (filed Oct. 28, 1999) (PUC Interchange Item 148). ExteNet Ex. 5 at Ex. JPG-3 and JPG-4, respectively.

[74] ExteNet Ex. 5 at 5, 16.

[75] Tr. at 124.

> with the operator's core network. A backhaul network may be made up of single link or multiple intermediate links.[76]

ExteNet explains that in a traditional architecture, backhaul extended from a macro tower, where the RRH and BBU were both located, to the MSO. ExteNet notes that, due to growing bandwidth needs, the traditional architecture of macro towers using high powered antennas is being augmented by a distributed architecture of smaller, lower powered antennas located closer together, using optic fiber. ExteNet contends that its backhaul service performs the same function as traditional backhaul, just through a distributed architecture.[77]

ExteNet describes itself as a neutral-host provider; its backhaul services are wholesale, available for lease to multiple CMRS providers.[78] ExteNet contends that neutral-host providers reduce the need for an individual CMRS provider to install its own network of antennas in every location, thereby improving end-user service, allowing more efficient use of spectrum and increasing efficiencies in the use of public right of way. For instance, Verizon could provide the backhaul function it obtains from ExteNet.[79] This would include design of the facility, selection of equipment, and installation and operation of the facilities.[80] ExteNet contends that whether this is done by Verizon, or obtained on a wholesale basis from an ILEC, CLEC, or ExteNet, the function is the same; when a CMRS provider acquires that function from another telecommunications carrier, the function is obtained as a service, and the service is known as backhaul.[81]

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[76] ExteNet Ex. 5 at 16, citing Newton's Telecom Dictionary (28th ed. 2014) at 183. The definition of "backhaul" from Newton's Telecom Dictionary; attached to ExteNet Ex. 5, Ex. JPG-2.

[77] Tr. at 206-08.

[78] ExteNet Ex. 1 at 4, 5; ExteNet Ex. 2 at 6-7; Tr. at 70.

[79] Tr. at 125.

[80] As Dr. Cutrer explained, however, in today's environment, wireless carriers are using wholesale carriers to provide backhaul. ExteNet Ex. 2 at 7; ExteNet Ex. 3 at 6.

[81] Tr. at 91.

The ALJs now turn to the arguments of Staff and the City. Staff's argument focuses on the definition of "backhaul" and the regulatory impact of classifying ExteNet's services as backhaul. Among the City's numerous arguments are claims that:

- ExteNet actually provides wireless services;
- ExteNet's services are not interoffice transport and thus not are backhaul; and
- At a technical level, ExteNet is not providing backhaul.

As explained below, the ALJs find that none of these arguments change the answer to the question posed in the Preliminary Order: "What services will ExteNet provide through use of these facilities?" The ALJs find that the answer is ExteNet will provide wholesale backhaul services to wireless providers.

2. The Commission was Aware of Backhaul for Wireless Providers in Project No. 20935

Staff argues that ExteNet's backhaul service is not covered by Chapter 283. Staff acknowledges that ExteNet provides a *type* of backhaul, which Staff defines as "transmission media that does not end at an end-use customer's premises."[82] Staff contends that Chapter 283 only applies to backhaul used for LETS. Because ExteNet provides its backhaul exclusively to CMRS carriers, Staff argues ExteNet's backhaul is not a qualifying service under Chapter 283. Consistent with that argument, Staff also contends that ExteNet's definition of backhaul is unreasonable, because it derives from Newton's Telecom Dictionary and applies explicitly to wireless service, which according to Staff, is excluded from coverage under Chapter 283.[83]

ExteNet responds that the Commission was aware of and considered backhaul for wireless providers when it adopted its rules implementing Chapter 283. ExteNet notes that in Project No. 20935, a full record was developed on the existence of backhaul and whether it

[82] *See* Tr. at 184-85, 374.

[83] *See* ExteNet's Initial Brief at 5; ExteNet Ex. 5 at Ex. JPG-2.

should be counted as an access line to determine a city's compensation. ExteNet points out that, during the development of the Commission's rules, cities, industry, and the Commission clearly contemplated backhaul provided to CMRS carriers. For instance, one of the questions Staff posed was how transmission facilities that served *wireless providers* should be treated.[84] Responsive comments filed by the Texas Municipal League (TML) and participating cities specifically used the term "backhaul" to describe transmission facilities that connected *a wireless provider's* cell towers to the wireless provider's switch.[85]

ExteNet points out that, despite the fact that the Commission considered multiple types of backhaul in Project No. 20935, its implementing rules do not discuss types of backhaul or whether some types should be counted under Chapter 283. The rules do not even address the very type of backhaul TML and the cities were concerned with – backhaul to wireless providers. ExteNet notes that the question the Commission weighed at that time was whether to count backhaul as an access line. Because backhaul is generally excluded from the definition of an "access line," ExteNet argues the logical conclusion is that backhaul to CMRS providers is also excluded from counting as an access line.

ExteNet notes that Staff's argument that the Commission only contemplated "backhaul facilities used in providing LETS" also lacks critical detail.[86] ExteNet points out that Staff did not address the filed comments or the workshop transcript from Project No. 20935 discussed above. Nor did Staff explain what the LETS-only backhaul facilities would be, how backhaul is

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[84] Project No. 20935, *Implementation of HB 1777*, Proposed New Rule § 26.465, Preamble at 3 (Sept. 24, 1999) (PUC Interchange Item 127), where the Commission specifically asked for comments regarding the following question:

> (2) Whether connections (transmission facilities) to wireless providers which are used solely for the purposes of providing wireless telecommunications services have to be counted as access lines and, if not, whether an exemption creates implications for Internet service providers and other providers of voice or data transmission whose access lines are counted . . .

[85] Project No. 20935, *Implementation of HB 1777*, Joint Comments on Proposed Rule § 26.465 Counting Access Lines filed by City of Austin, *et al.* (cities) and Coalition of Cities at 3 (filed Oct. 28, 1999) (PUC Interchange Item 149); and Comments of TML at 1 (filed Oct. 28, 1999) (PUC Interchange Item 148). The Cities Comments and TML Comments are attached to ExteNet Ex. 5, at Ex. JPG-3 and JPG-4, respectively.

[86] Staff Initial Brief at 8.

used to provide LETS, and how such facilities differ from ExteNet's backhaul facilities. ExteNet asserts that Staff's argument presupposes that backhaul used for LETS implies an end-to-end connection, in which LETS-only backhaul connects directly to a single local telephone line, much less intermediate or final connections or routing to or through another type of network, such as a wireless network.[87]

Finally, ExteNet explains that its backhaul performs the same function that was discussed in Project No. 20935. ExteNet notes that its architecture is not materially different from any other backhaul provider of dark fiber to a CMRS provider. Mr. Gillan testified that:

> If there is any difference between ExteNet's backhaul architecture and that of a more traditional provider it is that ExteNet's facilities receive wireless traffic *on* the antenna instead of *at* the antenna. But this distinction is immaterial to basic functionality of connecting Verizon Wireless' telecommunications equipment so that its traffic (voice and data) can be aggregated and "hauled back" (or backhauled) to its facilities at the hub.[88]

The ALJs find that Staff's argument that backhaul is limited to LETS is too narrow. If Staff's argument were correct, and the Commission decided only backhaul used for LETS would be excluded from the access line count, then all other types of backhaul would be counted as an access line or removed from Chapter 283's coverage altogether. ExteNet established, however, that the Commission and the parties to Project No. 20935 were aware of and considered backhaul for wireless carriers. Notably, despite backhaul for wireless carriers being discussed during Project No. 20935, the Commission did not exclude wireless backhaul from any of the implementing rules, nor did it distinguish between different types of backhaul.

As a result, the ALJs consider "backhaul" to be an industry term, which focuses on the function of the facilities at issue. As pointed out by Staff, neither Chapter 283 nor the

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[87] Staff Initial Brief at 8 ("without this provision, the back-haul provider and the retail provider would both have to pay 'access line fees' on the same access line").

[88] ExteNet Ex. 4 at 9.

Commission's implementing rules define "backhaul facilities."[89] The Commission's implementing rules only use the term "backhaul facilities" twice, but that term is left undefined.[90] Because there is no legal or regulatory definition of backhaul, it is entirely appropriate for ExteNet (and any other party for that matter) to refer to an industry-specific definition as a starting point. The ALJs find that ExteNet's definition of backhaul in the context of wireless service does not somehow disqualify ExteNet's type of backhaul from coverage under Chapter 283. In fact, to so find would run counter to the stated policies in Chapter 283, including the lowering of barriers to market entry, by attempting to apply narrowly-tailored distinctions instead of focusing on a technology's function.

The ALJs note ExteNet's backhaul uses technological innovations in the provision of its services. Yet, as ExteNet established, the transport function it provides to its customers is still backhaul. As Mr. Alt explained:

> The only thing new about our backhaul network is that it is designed to support a more *modern* CMRS architecture that relies on multiple, geographically dispersed, smaller antennas, rather than relatively few, but much larger, installations. In the traditional architecture, the CMRS carriers shared towers and backhaul providers (such as local and long distance carriers) built fiber to these locations. The ExteNet network adds the opportunity to share the antenna: but each of our customers is responsible for modulating its own licensed spectrum to/from that antenna, just as each carrier that leases dark fiber must modulate the light frequencies on that dark fiber. Our role is the same. Our facilities aggregate and transport the CMRS carrier's traffic for backhaul to its network for disposition. Our services in Houston—essentially dark fiber and a dark antenna—are simply a modern version of an architecture that has been in place for decades.[91]

The ALJs find that, during Project No. 20935, the Commission was aware of the use of backhaul by wireless providers and yet did not distinguish it as a separate type of backhaul, to be excluded from coverage under Chapter 283.

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[89] *See generally* Tex. Local Gov't Code Ch. 283; 16 Tex. Admin. Code § 26.465(f)(2)-(3); *See* Tr. at 179, 180, 373.

[90] 16 Tex. Admin. Code § 26.465(f)(2)-(3).

[91] ExteNet Ex. 1 at 9 (footnote omitted) (emphasis in original).

3. Preliminary Order Issue No. 2 Does Not Inquire as to the Impact of Classifying ExteNet's Services as Backhaul

Staff also argues that ExteNet's definition of backhaul is unreasonable because of the regulatory consequences that result from classifying those services as backhaul. Staff contends that, if ExteNet's service is considered backhaul, the company would not have to compensate the City for installing its facilities in the City's right of way. And, because Verizon is not covered by Chapter 283, it does not pay the City an allocation of the base amount. As a result, Staff argues the City would be uncompensated for ExteNet's use of its right of way.[92] Staff contends that the Commission never contemplated such a result when it developed rules to implement Chapter 283.

Staff's argument focuses on the impact of describing ExteNet's services as backhaul. The ALJs find that this argument exceeds the simple question presented by Preliminary Order Issue No. 2. Issue No. 2 only asks: "What services will ExteNet provide through use of these facilities?"[93] As explained above, while Staff raised valid questions as to how best to describe ExteNet's services, the ALJs find that ExteNet is providing backhaul to wireless providers.

The ALJs recognize that Staff is interpreting this question through the lens of Chapter 283 and the Commission's implementing rules. However, the issue Staff addresses is covered elsewhere in this PFD, including under Preliminary Order Issue No. 3. Furthermore, if Staff is taking into account the regulatory effect of classifying ExteNet's services as backhaul, then it should be pointed out that Verizon is compensating the City for access to its right of way. As explained above, under Chapter 283 and the Commission's rules, backhaul facilities are not counted for purposes of calculating the compensation paid to a municipality, because doing so

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[92] 16 Tex. Admin. Code § 26.461(c)(1)(B).

[93] Preliminary Order at 3.

would potentially lead to the double-counting of access lines for a single service.[94] Although Verizon is not covered by Chapter 283, the situation is somewhat analogous; the City is being compensated for Verizon's use of its right of way for the provision of a single service.

4. ExteNet's Service is Backhaul, Not Interoffice Transport

The City claims that ExteNet's service is not backhaul because it does not meet the definition of interoffice transport. Staff and ExteNet disagree. As explained below, the ALJs find that interoffice transport and backhaul are not the same and that ExteNet is providing backhaul, not interoffice transport.

The City defines interoffice transport as "transmission facilities between two central offices."[95] Because ExteNet does not have central offices, the City contends ExteNet cannot meet the definition of interoffice transport. This is significant because, according to the City, the Commission's *Access Line Counting Rule Order* equates backhaul and interoffice transport.[96] The City concludes that if ExteNet's service is not interoffice transport, then it is not backhaul.

The City also argues that, because ExteNet's specific equipment includes antenna, conversion equipment, and connective fiber optic cable, the company's service is a wireless network. Because the Commission found that lines to wireless providers are not considered interoffice transport, the City argues that ExteNet's wireless-related services cannot be backhaul.[97]

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[94] Under the Commission's rules, "the definition of 'access lines' may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer's premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service." 16 Tex. Admin. Code § 26.461(c)(1)(B). *See also* Tex. Local Gov't Code § 283.002(1)(B).

[95] COH Ex. 3 at 33-35.

[96] *Access Line Counting Rule Order* at 51-52. It was the Commission's "intention ... to exclude back-haul facilities, *as these would constitute interoffice transport.* ... the commission ... revised subsection (f)(2) by *replacing the term 'transmission facilities'* with the term *'back-haul' facilities* to provide clarity."

[97] *Access Line Counting Rule Order* at 12-14. "The commission also clarifies that it does not consider lines to wireless providers to be interoffice transport."

ExteNet does not disagree with the City's definition of interoffice transport as "transmission facilities between two central offices."[98] ExteNet also acknowledges City witness Steven E. Turner's explanation that interoffice transport "provides the connectivity between central offices – hence, the use of the term 'interoffice transport.'"[99] ExteNet argues, however, that despite Mr. Turner's correct definition of interoffice transport, at times the City incorrectly defines interoffice transport in its briefing. For instance, the City contends that interoffice transport includes facilities between a cell site and a CMRS provider's MSO. ExteNet disagrees, however, asserting that a CMRS provider's cell site, hub, and MSO are not central offices.

ExteNet also argues that interoffice transport is irrelevant to this case because it is distinct from backhaul. ExteNet disagrees with the City's contention that backhaul is a subset of interoffice transport, arguing that the City provided no support for this contention. Staff also takes issue with the City's contention and notes that, in the two references to backhaul facilities in the Commission's rules, backhaul and interoffice transport are described as separate services, neither of which should be counted as access lines:

16 Texas Administrative Code § 26.465(f)(2):

> Lines used by providers who are not end-use customers such as a CTP, wireless provider, or IXC[100] *for interoffice transport, or back-haul facilities* used to connect such providers' telecommunications equipment.

16 Texas Administrative Code § 26.465(f)(3):

> Lines used by a CTP's wireless and IXC affiliates who are not end-use customers, *for interoffice transport, or back-haul facilities* used to connect such affiliates' telecommunications equipment.

Staff points out that, on cross examination, the City's expert, Mr. Turner, agreed that "back-haul facilities" written in this context is "its own separate clause" in the sentence, distinct from the

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[98] COH Ex. 3 at 33-34.

[99] COH Ex. 4 at 3 (emphasis in original).

[100] Interexchange carrier.

term "interoffice transport."[101] The ALJs agree with Staff that, in the Commission's rules, interoffice transport and backhaul are treated as separate services. The word "or" between the two clauses has meaning.[102] The ALJs find that whether ExteNet's service is considered interoffice transport is not determinative of whether it is backhaul.

The City also argues that because ExteNet is essentially a wireless provider, its services cannot be classified as backhaul. The City focuses on the Commission's conclusion in the *Access Line Counting Rule Order* that "the wireless network falls outside the definition of access lines."[103]. The Commission then stated that the definition "excludes lines terminating to a wireless provider" from the access line count, and "clarifies that it does not consider lines to wireless providers to be interoffice transport."[104] In response, ExteNet flatly denies that it is a wireless provider. As explained below, the ALJs agree that ExteNet is not a wireless provider. And as explained above, interoffice transport and backhaul are separate services; ExteNet is providing backhaul, not interoffice transport.

5. The Function of ExteNet's Equipment is to Provide Backhaul Service

Next, the City engages in a granular focus on ExteNet's equipment to argue that ExteNet's service is not backhaul due to its termination point. Specifically, the City contends that ExteNet's fiber connects to a fiber patch panel, not to a wireless provider. As a result, according to the City, ExteNet's service is not backhaul.[105] ExteNet responds that, in the context of Chapter 283, the term "termination" does not refer to an equipment termination point, but rather where the line terminates at the customer. ExteNet also argues that neither Chapter 283 nor the Commission's rules contemplate this level of technical detail.[106]

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[101] Tr. at 373.

[102] 16 Tex. Admin. Code § 26.465(f)(2), (f)(3).

[103] City Initial Brief at 28.

[104] *Access Line Counting Rule Order* at 14.

[105] City Initial Brief at 28.

[106] 16 Tex. Admin. Code § 26.465(f).

The ALJs agree with ExteNet that the City's focus on ExteNet's equipment misses the proper aim of the inquiry, which is the function of ExteNet's facilities. For instance, in Project No. 26412, the Commission revised the definition of "access line" in the context of what constitutes a "switched transmission path." In revising the definition, the Commission stated:

> The commission's amendment to the definition of transmission path does not alter the requirement that an access line must be switched, but rather removes the limitation that the switch used must be a circuit-switch. In practice, a switch is a relatively simple concept. A switch creates a pathway between end-users. This pathway is not necessarily a dedicated circuit, but routes information between these end-users. *Functionality, rather than technology, is the threshold.*[107]

Furthermore, to narrowly focus on a new technology's equipment instead of its function is likely to distinguish and exclude it from coverage under Chapter 283. Such a result would undermine the law's stated purposes of removing barriers to entry and encouraging competition.[108] As Mr. Gillan noted, 16 Texas Administrative Code § 26.465(f)(2) is:

> [A]rchitecture and technology neutral, simply recognizing backhaul as "facilities used to connect such [CTP, wireless, or IXC] providers' telecommunications equipment." This approach recognizes the importance of wholesale carrier's carriers to the provision of end-user services without imposing any particular architecture or technology. This is the appropriate policy to foster innovation and technological change and, at the very least, should not be abandoned without a comprehensive rulemaking.[109]

6. The ExteNet/Verizon Contract Contemplates Backhaul Service

The City also argues that the service ExteNet provides is inconsistent with the definition of backhaul and its contract with Verizon.[110] ExteNet responds that the ExteNet/Verizon Contract is a multi-state agreement that addresses various configurations depending on the

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[107] *Rulemaking to Amend P.U.C. Substantive Rule 26.465*, Project No. 26412, Order Adopting Amendments to § 26.465 as Approved at the February 15, 2003 Open Meeting, at 12 (emphasis added).

[108] Tex. Local Gov't Code § 283.001(a)(1)-(4).

[109] ExteNet Ex. 4 at 15-16.

[110] City Initial Brief at 29-30; COH Ex. 29, HIGHLY SENSITIVE PROTECTED Portions of Licensee Contract #121454 Amended and Restated Master Distributed Network License Agreement Between Cellco Partnership d/b/a Verizon Wireless and ExteNet Systems, Inc. (ExteNet/Verizon Contract).

network and Verizon's orders.[111] ExteNet points out that there is no dispute Verizon owns the RHH and BBU, and ExteNet owns and operates all of the remaining equipment in the node and dark fiber.[112] ExteNet also argues that the definitions cited by the City are generally vague and reference equipment that could be owned by either ExteNet or Verizon. Most important, however, ExteNet witness David Cutrer, Ph.D., testified that the service described in the contract has the same function as the RF Transport his former company provided – and that service is backhaul.[113]

7. The City's Position is Inconsistent with the Intent of Chapter 283

Finally, Staff is concerned that the City's position is so broad that, if adopted, all CTPs providing backhaul would no longer be covered under Chapter 283. Currently, many wholesale providers lease backhaul facilities to retail LETS providers under Chapter 283.[114] The City argues that backhaul service is not included under Chapter 283 because a backhaul provider has no end-use retail customers.[115] If the City's position is adopted, then Staff anticipates CTPs providing backhaul to LETS providers could lose Chapter 283 protection and have to reestablish franchise agreements with the City for right of way access.[116]

The ALJs have expressly stated that the proposed outcome of this case is limited to its facts. As a result, Staff's concern may be unwarranted. Staff's concern does, however, highlight the ALJs' recommendation in this case. This docket presents a problem where technology appears to have outpaced the regulatory environment. The legislature clearly foresaw this situation in drafting Chapter 283 as evidenced by the provision's explicit policy goals and adjustment mechanisms. Yet, even if ExteNet's technology is a misfit with Chapter 283, it is

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[111] COH Ex. 29.

[112] COH Ex. 15; ExteNet Ex. 1 at 7-8; ExteNet Ex. 4 at 8-9.

[113] ExteNet Ex. 2 at 6.

[114] *See* Tr. at 377-79.

[115] COH Ex. 3 at 24 (quoting 16 Texas Administrative Code § 26.465(f)(1), "all lines that do not terminate at an end-use customer's premises" are "lines not to be counted").

[116] *See* Comcast's amicus brief at 1-3 (Nov. 16, 2016).

more consistent with the legislature's intent to find that ExteNet's backhaul services are covered than to exclude them. In contrast, the City's position is at odds with Chapter 283's goal of flexibility for new technologies by removing barriers for new market entrants and encouraging competition.[117]

B. Is ExteNet Providing Commercial Mobile Radio Service?

The City argues that ExteNet is providing nothing more than CMRS. Both ExteNet and Staff disagree. As explained below, the ALJs find that ExteNet is not providing CMRS, although it does serve as a wholesale contractor for CMRS providers.

The City argues that ExteNet's service is essentially an adjunct to CMRS. The City claims the only function of ExteNet's facilities is to provide CMRS, or its equivalent. The City asserts that ExteNet's facilities perform the same functions that Verizon can perform for itself.[118] Thus, according to the City, ExteNet is providing an essential component of CMRS and nothing else.[119] The City points out that in the *Base Amount Order*, the Commission determined wireless network service provided by a CMRS provider is outside the framework of Chapter 283.[120] Such services include cable services and long-distance services. Because wireless service is outside the framework of Chapter 283, to obtain access to the City's right of way, ExteNet needs to make arrangements outside of Chapter 283.

ExteNet and Staff disagree. ExteNet first notes that two of its witnesses, with industry experience in this subject area, testified that ExteNet is not providing CMRS. ExteNet points out that CMRS is defined by federal law, which requires a CMRS provider to hold a right to use specific radio spectrum under license from the Federal Communications Commission (FCC) to provide cellular services and wireless broadband. On behalf of ExteNet, Mr. Alt testified that "to

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[117] Tex. Local Gov't Code § 283.001(a).

[118] ExteNet Complaint at 12-13; COH Ex. 3 at 28.

[119] Tr. at 91, 99-105.

[120] COH Ex. 3 at 25.

facilitate a wireless service, you have to be transmitting and receiving over some carrier wave[121] which is in spectrum. The backhaul doesn't have any spectrum allocation to it."[122] Mr. Alt also explained:

> [ExteNet] does not own or control (or otherwise have the right to use) the spectrum necessary to provide CMRS services or any other type of wireless service. ExteNet's customers have been awarded or otherwise acquired spectrum licenses from the [FCC] that are necessary to be able to provide CMRS services. My former employer Sprint, and Verizon Wireless, AT&T Wireless and T-Mobile are companies people commonly think of as wireless carriers. They are CMRS carriers that hold licensed spectrum.[123]

ExteNet also argues that a telecommunications service provider is not a CMRS provider unless it is providing a mobile service and there is a mobile station on at least one end of the communication. ExteNet notes that it does not provide a "mobile service" as defined by statute, nor is there a "mobile station" on one end of the communications service it provides. Section 153(33) of the Federal Communications Act of 1934 (the Act)[124] defines a "mobile service" as:

> *a radio communication service* carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations . . . for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90–314; ET Docket No. 92–100), or any successor proceeding.

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[121] As Mr. Alt explained, "Carrier wave would be a frequency, a specific frequency that would be the center of the modulated signal. So, for example, 1950 megahertz would be a carrier wave frequency." It is not the same as "wireless." Again, as Mr. Alt explained, "a RF frequency or a RF signal can be carried by any medium, whether it be cabled or whether it be wireless." Tr. at 126.

[122] Tr. at 124.

[123] ExteNet Ex. 1 at 9-10. ExteNet notes that Mr. Alt's professional experience includes working for Sprint, a CMRS provider. ExteNet Ex. 1 at 3.

[124] The Communications Act of 1934 as amended (the Act) (emphasis added).

The Act defines a "mobile station" in Section 153(34) as "a radio-communication station capable of being moved and which ordinarily does move." On behalf of ExteNet, Dr. Cutrer explained that "cellphones, smartphones, and other wireless devices that people carry with them and use to make calls and access the Internet are mobile stations."[125]

Furthermore, with respect to the definition of a "mobile service" in Section 153(33), Dr. Cutrer stressed that CMRS is a "radio communication service":

> The facilities that ExteNet is planning to deploy in the Houston right-of-way are not capable of independently providing a radio communication service. Its facilities are inert; they neither send nor receive any radio communications until activated *by ExteNet's CMRS carrier customer*. No signals are radiated from the antenna, no signals are received at the antenna, and no communications occur until activated by the CMRS carrier. The sending and receiving of signals is under the sole control of the CMRS carrier utilizing its FCC licensed spectrum.[126]

Dr. Cutrer also testified that no radio license is required to install the antenna or any other equipment to be located at ExteNet's nodes to provide the company's backhaul service.[127]

Finally, ExteNet points out that Section 332(d) of the Act defines a "commercial mobile service" as:

> [A]ny mobile service (as defined in [the Act]) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the [FCC].[128]

Although ExteNet's facilities are undoubtedly used in the provision of a wireless mobile service,[129] ExteNet's services are provided exclusively on a wholesale basis, meaning that it is

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[125] ExteNet Ex. 2 at 9.

[126] ExteNet Ex. 2 at 9 (emphasis added).

[127] ExteNet Ex. 2 at 12.

[128] *See also* 47 C.F.R. § 20.3.

[129] Mobile services include a scenario in which radio communications are carried on between mobile receivers, such as cell phones and fixed receivers, such as small cell antennas. 47 C.F.R. § 20.3.

not available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public.[130] Staff agrees with ExteNet's position to the limited extent that ExteNet's service is a wholesale service that is not generally available to the public.

The ALJs agree with ExteNet and Staff that the company does not offer CMRS. As demonstrated by ExteNet, it lacks numerous key elements to be legally classified as a provider of wireless services. ExteNet:

- Lacks a right to use specific radio spectrum under license from the FCC;
- Lacks any spectrum allocation to its backhaul service;
- Is not capable of independently providing a radio communication service – the company's facilities are inert;
- Does not need a radio license to install the company's backhaul service;
- Does not provide a "mobile service" as defined by statute;
- Lacks a "mobile station" on one end of its backhaul service;
- Does not offer CMRS to end user customers; and
- Provides its service exclusively on a wholesale basis, meaning that it is not available to the public.[131]

The ALJs, however, acknowledge the City's argument that ExteNet installs components whose primary function is to provide CMRS or its equivalent. The City also makes a valid point that ExteNet is a contractor installing and maintaining facilities on behalf of Verizon and potentially other CMRS providers. Despite these accurate characterizations of ExteNet's services, however, the ALJs disagree with the City's ultimate conclusion that ExteNet should be excluded from coverage under Chapter 283.

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[130] ExteNet Ex. 2 at 4.

[131] Tr. at 118; COH Ex. 26.

The City's arguments rely on two critical characterizations of ExteNet's services with which the ALJs disagree. First, the City predicates its arguments on the claim that ExteNet is not a CTP for purposes of Chapter 283.[132] As explained herein, the ALJs find that ExteNet is a CTP. Second, the City claims that ExteNet is not providing backhaul. As explained above, the ALJs find that ExteNet is providing backhaul. Thus, although ExteNet's primary role is that of a wholesale contractor for facilities used by wireless providers, it should not be excluded from coverage under Chapter 283 because it is also a CTP that provides backhaul, albeit for retail wireless providers.

C. Is ExteNet Providing Other Services Through its Facilities?

ExteNet explains that although it offers a backhaul service to CMRS providers, the fiber it installs is capable of other uses. For example, ExteNet could offer point-to-point service on a wholesale basis in a configuration that did not include a node.[133] ExteNet also reiterates that the voice calls and data carried on the company's backhaul service are not just wireless-to-wireless communications. Verizon's end-user customers make voice calls to end users at businesses, stores, government agencies, homes, and other locations served by landlines and where a landline, not a cellphone, is picked up to answer a call. ExteNet points out that these landline end users also make calls to wireless end users.[134] Furthermore, the traffic being carried over ExteNet's backhaul service includes both local and long distance calls, as well as texts and data. ExteNet does not offer services to end user customers,[135] but its backhaul service is used to transport all of the types of telecommunications traffic sent to or received by Verizon's end user customers.

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[132] City Initial Brief at 36.

[133] Tr. at 122.

[134] Tr. at 200-02.

[135] Tr. at 118; COH Ex. 26.

The City argues that ExteNet does nothing more than install facilities a CMRS provider needs for an expanded geographic footprint of its wireless services. The City also notes that, according to the testimony of Mr. Alt, Ms. Barlow, and Mr. Gillan, ExteNet does not provide:

- LETS;
- Non-switched private-line service;[136]
- Non-switched telecommunications service;
- Central-Office-based PBX service;[137]
- Customer-lit dark fiber (Dark Fiber Service); and [138]
- "Voice service" provided over Internet Protocols (VoIP).[139]

Most importantly, the City argues that because any qualified contractor can install ExteNet's facilities, the company does not provide a telecommunications service, a requisite for coverage under Chapter 283.[140] Finally, the City reiterates its argument that ExteNet does not provide interoffice transport or backhaul.[141]

As for the latter contentions, as the ALJs explained above, ExteNet is providing backhaul service to CMRS providers; the facilities it installs at its nodes and the fiber it installs under the street or aerially on utility poles are used for backhaul service.[142] Whether that service is also interoffice transport is irrelevant.

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[136] Tex. Local Gov't. Code § 283.002(1)(A) "access line" (ii) (non-switched private line data, point-to-point service); 16 Tex. Admin. Code § 26.465(d)(2) (non-switched private line data, point to point service).

[137] Tex. Local Gov't. Code § 283.002(1)(A) "access line" (iii) [PBX type service]; 16 Tex. Admin. Code § 26.465(d)(3) (PBX type service).

[138] 16 Tex. Admin. Code § 26.465(d)(2)(E) (customer lit dark fiber), (e)(6).

[139] Tex. Local Gov't. Code § 283.002(7) ("voice service" definition). *See also* 16 Tex. Admin. Code § 26.465(c)(E).

[140] COH Ex. 3 at 34.

[141] COH Ex. 25; Tr. at 163-64.

[142] Tr. at 122.

As for the City's contention that ExteNet is not providing a telecommunications service, the company strongly disagrees with this assertion. ExteNet points out that the City's argument relies on the Commission's summary report for ExteNet, which contains a list of specific types of telecommunications service and states whether ExteNet offers them.[143] With respect to "OPT SVCS," the notation provided was "Bus," meaning optical services provided to business customers. ExteNet argues the City provides no support for its conclusion that the provision of optical services to business customers is not a telecommunications service. Instead, ExteNet notes that Question 4 on the Commission's mandatory form applicants for certification must complete requires an applicant to describe the *telecommunications services* to be provided, and specifically identifies "Optical Services" as a telecommunications service, asking whether it will be provided to Business or Residential customers:[144]

> 4. (a) Provide a detailed description of the telecommunications services to be provided.
>
> (b) Indicate with a yes or no response for each item below, whether the Applicant will be providing *the following telecommunications services* and whether the service will be for business or residential service:

	Business	Residential
_____ POTS (Plain Old Telephone Service)	_____	_____
_____ ADSL	_____	_____
_____ ISDN	_____	_____
_____ HDSL	_____	_____
_____ SDSL	_____	_____
_____ RADSL	_____	_____
_____ VDSL	_____	_____
_____ *Optical Services*	_____	_____
_____ T1-Private Line	_____	_____
_____ Switch 56 KBPS (KiloBits Per Second)	_____	_____
_____ Frame Relay	_____	_____

[143] COH Ex. 25.

[144] *See* Application for Certification, Re-Qualification, or Amendment to a Service Provider Certificate of Operating Authority or a Certificate of Operating Authority at 6 (Q. 4), found at: www.puc.texas.gov/industry/communications/forms/clec/clecapp.pdf (emphasis added).

The ALJs agree with ExteNet that its backhaul service is an optical service provided over fiber optic cable. Specifically, as shown by ExteNet immediately above, the company's SPCOA application, which the Commission approved, states that ExteNet is providing business Optical Services.[145] As a result, the ALJs conclude that ExteNet provides a telecommunications service.

The ALJs conclude that, although ExteNet offers a backhaul service to CMRS providers, the fiber it installs is capable of other uses. ExteNet could, for example, offer point-to-point service on a wholesale basis in a configuration that does not include a node.

VII. PRELIMINARY ORDER ISSUE NO. 3[146]

A. Chapter 283 Applies to ExteNet

As explained throughout this PFD, the ALJs recommend that the answer to Preliminary Order Issue No. 3 is yes; Chapter 283 applies to ExteNet. Most of the analytic framework in response to Preliminary Order Issue No. 3 has already been addressed in this PFD. As a result, Preliminary Order Issue No. 3, which is composed of two questions, is answered by the ALJs in summary analysis. The parties' remaining arguments are addressed below.

The first question in Preliminary Order Issue No. 3 is:

> Does Texas Local Government Code chapter 283 apply to an entity that is a certificated telecommunications provider when it is providing services that do not require the entity to have a certificate under the Public Utility Regulatory Act (PURA)?

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[145] COH Ex. 17 (Official Notice), *Application of ExteNet Systems, Inc. for a Service Provider Certificate of Operating Authority*, Docket No. 33365 at 9.

[146] Does Texas Local Government Code chapter 283 apply to an entity that is a certificated telecommunications provider when it is providing services that do not require the entity to have a certificate under the Public Utility Regulatory Act (PURA)? Specifically, does chapter 283 apply where a certificated telecommunications provider has installed, or proposes to install, in the public right of way a wireless distributed antenna system, including fiber optic cables and an antenna?

The answer is yes. The primary issue in this case is whether Chapter 283 applies to ExteNet, which is a CTP, that does provide LETS, and the company's backhaul service is not dedicated to LETS. The ALJs find that ExteNet should be covered by Chapter 283 because it is a CTP providing a telecommunications service in the form of backhaul for CMRS providers.

Chapter 283 expresses no distinction between a CTP that provides LETS and one that does not. The language of Chapter 283 is definite. The chapter defines a CTP as:

> [A] person who has been issued a . . . service provider certificate of operating authority by the commission to *offer* local exchange telephone service . . . .[147]

ExteNet holds an SPCOA to *offer* LETS issued by the Commission and is thus a CTP under Chapter 283.[148] Chapter 283's application provision is also short, straight-forward, and contains no caveats:

> Application. This chapter applies only to municipal regulations and fees imposed on and collected from *certificated telecommunications providers.*[149]

Consistent with Chapter 283, the ALJs have found that H.B. 1777 was intended to apply to all CTPs, regardless of whether those CTPs provide telecommunications services over landlines or connections that initiate or terminate at a wireless network. As explained by Ms. Barlow, an attorney who actively participated in developing H.B. 1777:

> H.B. 1777 was intended to apply to *all* CTPs, not just those CTPs that provided telecommunications services over landlines. H.B. 1777's compensation scheme is tied to the provision of landline service, but H.B. 1777 is not limited to CTPs that provide only landline-based telecommunications services. During the H.B. 1777 negotiations, ILEC and municipal representatives were very firm on this point: H.B. 1777 would apply to *all* CTPs. There were no exemptions or exclusions. Teligent is a prime example of this fact. Teligent was a CTP that served its customers using wireless technology. Teligent did not provide any landline

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[147] Tex. Local Gov't Code § 283.002(2) (emphasis added).

[148] ExteNet holds SPCOA No. 60769 granted by the Commission in 2006 in Docket No. 33365. ExteNet is certificated to offer LETS as evidenced by the Notice of Approval.

[149] Tex. Local Gov't Code § 283.004 (emphasis added).

> telecommunications services, but Teligent nonetheless was subject to the provisions of H.B. 1777.[150]

The statute's plain language does not differentiate between classes of CTPs and does not create an exception for an entity that is a CTP that does not provide LETS.[151]

The ALJs also find the coverage of ExteNet under Chapter 283 to be consistent with the legislature's goals as expressed in Chapter 283.

The second question in Preliminary Order Issue No. 3 is:

> Specifically, does chapter 283 apply where a certificated telecommunications provider has installed, or proposes to install, in the public right of way a wireless distributed antenna system, including fiber optic cables and an antenna?

The answer is yes. The second question focuses on the wireless nature of ExteNet's service and the specific equipment it intends to install in the City's right of way. As the ALJs explained above, ExteNet is providing backhaul service. In developing its implementing rules, the Commission was aware that backhaul could include backhaul used by wireless providers. Despite this knowledge, the Commission decided not to count backhaul as an access line and did not distinguish among types of backhaul facilities.[152]

The second question also inquires as to the specific equipment ExteNet intends to install in the City's right of way. In this case, however, the ALJs do not consider the equipment itself to be a dispositive factor, so long as ExteNet is providing backhaul. As Mr. Gillan testified, the Commission's implementing rules are:

> [A]rchitecture and technology neutral, simply recognizing backhaul as "facilities used to connect [CTP, wireless or IXC] providers' telecommunications equipment." This approach recognizes the importance of wholesale carriers to the

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[150] ExteNet Ex. 6 at 13 (emphasis in original). *See also* Tr. at 253.

[151] *See generally* PFD Section IV.A.1, above, for further discussion.

[152] 16 Tex. Admin. Code § 26.465(f)(2), (3).

> provision of end-user services without imposing any particular architecture or technology. This is the appropriate policy to foster innovation and technological change and, at the very least, should not be abandoned without a comprehensive rulemaking.[153]

The ALJs conclude that ExteNet is providing backhaul, which is covered by Chapter 283.

B. Parties' Arguments

Most of the analytic framework and argument underlying the ALJs' conclusions above have already been discussed and analyzed in this PFD. The ALJs will not revisit those arguments and only address the parties' remaining arguments unique to Issue No. 3.

1. Regardless of its Status as a Contractor to CMRS Providers, ExteNet's is still a CTP

The City argues that ExteNet is not entitled to coverage under Chapter 283, because the company is nothing more than a contractor for Verizon, installing equipment that Verizon could install on its own. To the ALJs, this argument implicitly recognizes that the specific equipment installed by ExteNet is irrelevant. As with all backhaul, ExteNet's equipment is something the retail provider will ultimately use in the provision of its service – and could be installed by the retail provider. Other than using modern technology, nothing about ExteNet's equipment stands out from other forms of backhaul; as Dr. Cutrer explained, ExteNet's equipment is inert until activated by a provider.[154] And the only differences between ExteNet's and earlier technology, are that ExteNet uses a network of smaller antennas as opposed to a single large antenna, and its facilities receive wireless traffic *on* the antenna instead of *at* the antenna.[155] ExteNet's facilities meet the definition of backhaul, which is covered by Chapter 283.

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[153] ExteNet Ex. 4 at 15-16. *See also* ExteNet Ex. 5 at 16, Ex. JPG-2 at 183; 16 Tex. Admin. Code § 26.465(f)(2).

[154] ExteNet Ex. 2 at 9.

[155] ExteNet Ex. 4 at 9.

2. ExteNet is a CTP Despite the Fact that it Does Not Provide LETS.

Staff presents two basic arguments that ExteNet's backhaul is not covered by Chapter 283: the legislature intended Chapter 283 to apply only to entities that actually provide LETS; and the Commission's rules exclude CTPs that neither report nor pay access line fees to cities. Based on ExteNet's arguments the ALJs disagree with Staff and find that ExteNet is a covered CTP.

Staff asserts that the primary purpose of Chapter 283 is to facilitate competition between wholesale and retail providers of LETS. In support of this argument, Staff cites to Section 283.001(c).[156] ExteNet notes, however, that this section does not limit the provision's application to providers of LETS. Instead, it speaks of CTPs and telecommunications providers. The ALJs agree with ExteNet; LETS is not mentioned in this provision.

In addition to Chapter 283's applicability provision, which sets no limitations on the chapter's application to a CTP,[157] ExteNet also notes that 16 Texas Administrative Code § 26.467(b) states that "[t]he provisions of this section apply to certificated telecommunications providers (CTPs) and municipalities in the State of Texas, unless otherwise specified in this section." And subsection (k) states that "[t]he requirements listed in this subsection shall apply to all CTPs in the State of Texas, except those exempted pursuant to § 26.465 of this title." ExteNet points out that the exemption only applies to a CTP that does not terminate a franchise agreement or obligation under an existing city ordinance.[158]

Staff argues that ExteNet's reliance on the plain words of Chapter 283 is improper. According to Staff, the legislature purposefully chose the phrase "certificated to offer" LETS when enacting H.B. 1777 because it did not want to limit Chapter 283 to the incumbent telephone companies. Otherwise, new competitors such as CLECs would not be covered,

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[156] Staff Initial Brief at 10.

[157] Tex. Local Gov't Code § 283.004.

[158] 16 Tex. Admin. Code § 26.465(h).

because they were not yet universally providing LETS in 1998. ExteNet responds by pointing out that Section 283.002(2) was revised in 2005, and yet the legislature did not alter the "certificated to offer" language.[159] The ALJs find this persuasive.. When the legislature modified the definition of a CTP in 2005, it added the phrase: "or a person who provides voice service." It could also have changed the existing language to require that a CTP be providing local exchange service.[160] Yet, it did not.

Staff argues that ExteNet should not be considered a covered CTP because it has never offered LETS. In response, ExteNet points out that the only time restrictions placed on the company were that it was required to notify the Commission if it had not provided "a service"[161] for a period of 12 consecutive months and that an SPCOA certificate holder which had not "provided service within 48 months of being granted the certificate may have its certificate suspended or revoked, after due process and hearing pursuant to the Commission's rules."[162] Despite these provisions, ExteNet applied for and was granted a renewal of its SPCOA on July 17, 2014, approximately eight years after the Commission issued the original SPCOA

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[159] *See Love v. City of Dallas*, 40 S.W.2d 20, 23–24 (1931) ("Since the Legislature has used different words to express its meaning, we must conclude that the language employed was not intended to express the same meaning."); *Missouri, K.&T. Ry. Co. of Tex. v. Gregory*, 226 S.W. 1075 (1918) ("[H]ad the Legislature intended otherwise, it rationally would have employed different or additional words in said act."). Courts are particularly resistant to attempts to read additional language into a statutory provision where that statute has recently been amended, as is the case here. *See Silva-Trevino v. Holder*, 742 F.3d 197, 201 (5th Cir. 2014) (rejecting Attorney General's novel interpretation of longstanding deportation clause after noting that other aspects of the statute were extensively amended just a few years earlier and that Congress "could have given some indication" if it wanted courts to enforce the deportation clause in a new way); *Martinez v. Second Injury Fund of Tex.*, 789 S.W.2d 267, 270 (Tex. 1990) (rejecting agency's attempt to introduce non-existent notice requirement into statute where the Legislature "could have done so by express provision . . . when it amended [the statute]" to clarify filing requirements).

[160] ExteNet also notes that the legislature amended the definition of a CTP after the Commission issued its Order on Certified Issue in Docket No. 24480, in which ExteNet asserts that the Commission determined a certificated entity was not required to be providing LETS to be covered under Chapter 283.

[161] COH Official Notice Ex. 18 (Notice of Approval) at 4-6. The word "service" in the Commission's Notice of Approval is not defined.. However, ExteNet argues that the grant of the SPCOA recognizes that it was for facilities-based, data, and resale *telecommunications* services. COH Official Notice Ex. 18 at 3 (Ordering Paragraph No. 1)(emphasis added); *also see* COH Official Notice Ex. 17 (ExteNet's Application for SPCOA) at 8 (Response to Q4(a) where ExteNet identified that it was providing a business Optical Service, which according to the PUC form is considered a telecommunications service).

[162] COH Official Notice Ex. 18 at 4 (Ordering Paragraph No. 5).

in 2006.[163] ExteNet points out that, at the time the original application and renewal were filed, no party to this proceeding, objected to or questioned ExteNet's eligibility for the SPCOA or its renewal.

Finally, ExteNet argues that the Commission has held that a certificated entity is not required to actually provide LETS in order to be a CTP under Chapter 283.[164] In 2001, Metromedia Fiber Network Services, Inc. (MFN) was constructing a fiber ring and offered nonswitched point-to-point service to both wholesale and retail customers. MFN offered no LETS, so it was the City of Carrollton's position that a franchise agreement was required. The question of whether a certificated entity had to actually be providing LETS in order to be a CTP was certified to the Commission. The Commission's Order on Certified Issue concluded:

> An SPCOA holder is authorized, via its certificate, to offer LETS [local exchange telephone service] as well as other telecommunications services unless the certificate is restricted to specifically exclude LETS. *Thus, satisfying the definition of CTP in Chapter 283 requires only that a person is a certificate holder with the authority to provide LETS and not upon the actual provision of services by a certificate holder as the City contended.* Consequently, the City's argument that MFN does not currently offer LETS is irrelevant to this issue because MFN possesses the authority to offer LETS by virtue of its SPCOA. Accordingly, *the Commission concludes that an SPCOA holder providing nonswitched telecommunications services is a CTP within the meaning of Chapter 283 of the TEX. LOC. GOV'T CODE to the extent the SPCOA holder is certificated to offer local exchange telephone service.*[165]

The ALJs find the Commission's holding in the MFN Decision persuasive on this issue. ExteNet is not excluded from coverage under Chapter 283 because the company does not offer LETS.

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[163] COH Official Notice Ex. 19 (ExteNet On-line Filing for Renewal of SPCOA) (dated July 17, 2014).

[164] *Complaint of Metromedia Fiber Network Services, Inc. Against the City of Carrollton, Texas Under the Public Utility Regulatory Act and HB 1777*, Docket No. 24480, Order on Certified Issue (Sept. 28, 2001) (MFN Decision).

[165] MFN Decision at 4-5 (emphasis added).

3. Chapter 283 Does Not Require ExteNet's Backhaul to Qualify as an Access Line Before it is Covered

Staff's second argument is related to its first; Staff argues that, only when a CTP's provision of service generates an access line will a city be compensated for the CTP's use of the city's right of way under Chapter 283. Staff asserts that Chapter 283 is a two-step process. The first step is to determine whether a CTP has "access lines" as defined in 16 Texas Administrative Code § 26.461(c)(1)(A)(i-iv). That is, the first step is to determine whether a CTP has facilities located in the right of way that are used to provide LETS or another qualifying service. Because ExteNet's facilities and services generate no access lines, ExteNet's backhaul is not covered under Chapter 283.

ExteNet disagrees arguing that Staff points to no language in Chapter 283 or in the Commission's implementing rules that says a CTP is only covered by the statute if it has access lines to report. ExteNet also argues that Staff's position is not supported by the Commission's Orders. The Commission's MFN Decision, for instance, is directly contrary to Staff's theory.[166] ExteNet also argues that it is inconceivable the Commission would adopt such a process without discussing it in its Project No. 20935 implementing H.B. 1777. Furthermore, ExteNet argues that a two-step process would suffer from impracticalities that render it inconsistent with Chapter 283's objective that compensation be administratively simple.

The ALJs agree with ExteNet on this argument. Staff's point is that, to be covered under Chapter 283, a CTP must provide some form of qualifying service, such as LETS. While a rulemaking may conclude that this is the intent of Chapter 283, the MFN Decision conflicts with such a conclusion. Furthermore, when it implemented Chapter 283, the Commission was aware of the potential for wireless CTPs to provide backhaul, and yet included no distinction between different types of backhaul in its rules.

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[166] *See* MFN Decision at 4-5.

VIII. CONCLUSION

The ALJs find that ExteNet is a CTP under Chapter 283 and that ExteNet provides backhaul service. Backhaul is excluded from the definition of "access line," and therefore, ExteNet is not subject to a Chapter 283 fee for its backhaul service.

IX. FINDINGS OF FACT

Introduction and Procedural History

1. On October 23, 2015, ExteNet Network Systems, Inc. (ExteNet) filed a complaint against the City of Houston (City or Houston) alleging that the City improperly imposed fees for the use of the public right of way and seeking a determination by the Public Utility Commission of Texas (Commission) of the amount of compensation, if any, due to the City for placement of telecommunications facilities in the public right of way under Chapter 283 of the Texas Local Government Code (Chapter 283) and the Commission's implementing rules.

2. Both Commission Staff (Staff) and the City filed Motions to Dismiss.

3. On January 16, 2016, the Commission issued an Order of Referral, referring the case to the State Office of Administrative Hearings (SOAH).

4. On March 25, 2016, the Commission issued its Preliminary Order and did not rule on the pending Motions to Dismiss.

5. The hearing convened on October 4, 2016, and the record closed on December 29, 2016, with the filing of proposed findings of fact and conclusions of law.

6. Staff's and City's Motions to Dismiss were carried with the case, and are denied with the issuance of this Proposal for Decision (PFD).

Chapter 283 Law and Policy

7. The deregulation of the local exchange telecommunications industry took place in Texas in 1995, closely followed by federal deregulation in 1996.

8. Prior to deregulation, local exchange carriers operated as local area monopolies.

9. The incumbent local exchange carriers enjoyed market advantages over the competitive local exchange companies.

10. In 1999, the 76th Texas Legislature enacted Chapter 283 to eliminate the anticompetitive practices by replacing local franchise agreements with a state-level regulatory regime.

Certificated Telecommunications Provider (CTP)

11. ExteNet holds Service Provider Certificate of Operating Authority (SPCOA) No. 60769 granted by the Commission in 2006, which the Commission renewed in 2014.

12. ExteNet is a CTP certificated to offer Local Exchange Telephone Service (LETS).

Access Lines

13. ExteNet has no access lines.

14. Access lines are used to calculate the fee paid to municipalities under Chapter 283.

15. Backhaul is excluded from the count of access lines.

16. Since 2010, the Commission has not reviewed the definition of "access line" to determine whether changes are needed to the definition due to changes in technology or in the market.

Base Amount

17. The base amount is the amount each city was paid under the franchise fee scheme in effect prior to the passage of Chapter 283.

18. The base amount was calculated by adding franchise, license, permit, and application fees, plus in-kind services or facilities. Taxes, special assessments, and pole rental fees were excluded from the base amount.

19. To determine the base amount, each city totaled its compensation received, then divided (on an allocated basis) the total amount by the number of access lines to determine the proper fee to be assigned to each type of access line.

20. With no access lines, ExteNet is not affected by the base amount calculations.

ExteNet's Facilities (Preliminary Order Issue No. 1)

21. ExteNet is a wholesale distributed antenna system (DAS) provider. The DAS service extends from an antenna located on a utility pole back to the Commercial Mobile Radio Service (CMRS) provider's hub location.

22. The DAS service routes customers' cellphone calls to the CMRS provider's hub and switch to allow the CMRS provider to connect the caller to the person being called.

23. The DAS technology can provide backhaul to several CMRS providers at the same time and route the call to the appropriate CMRS provider.

24. The node is a collection of several facilities located on or adjacent to a utility pole.

25. At the node is the antenna, placed at a location where there is a "hot spot" of demand from wireless end users.

26. A Remote Radio Head (RRH), which transmits and receives the wireless signal, is located at the node. The RRH is owned by the CMRS carrier, not ExteNet.

27. Coaxial cable that carries the radio frequency signal from the antenna to the RRH is located at the node.

28. ExteNet also installs fiber optic cable at the node. The fiber optic cable begins at the node and runs to the CMRS provider's baseband unit. That distance can be several miles.

29. The antenna and RRH are connected to a fiber patch panel, also at the node. There is an electricity meter, possibly batteries, and an electrical line running to the fiber patch panel and RRH.

30. The fiber cable extending from the node terminates at a baseband unit (BBU) located at the CMRS provider's hub. The BBU routes the CMRS voice and data traffic to the Mobile Switching Office. ExteNet's fiber ends at the BBU.

31. ExteNet only owns the antenna, and one fiber patch panel. The CMRS carrier owns the RRH, the cable connecting the RRH to ExteNet's fiber patch panel, and the cable connecting the fiber patch panel to the CMRS carrier's BBU.

32. ExteNet's equipment is leased to CMRS providers. ExteNet maintains by agreement the CMRS provider-owned equipment.

Services to be Provided by ExteNet (Preliminary Order Issue No. 2)

33. "Backhaul" describes transmission facilities that connect a CMRS provider's cell towers to the CMRS provider's switch.

34. ExteNet provides an unswitched, dedicated, point-to-point transport service to retail CMRS providers.

35. ExteNet is a neutral host provider of backhaul service for retail CMRS providers.

36. Interoffice transport consists of transmission facilities between two central offices.

37. ExteNet does not provide interoffice transport.

38. ExteNet's services are provided exclusively on a wholesale basis, which are not available to the public or effectively available to a substantial portion of the public.

39. ExteNet is not a provider of wireless services, because ExteNet:

- Lacks a right to use specific radio spectrum under license from the Federal Communications Commission;
- Lacks any spectrum allocation to its backhaul service;
- Is not capable of independently providing a radio communication service;
- Installs facilities that are inert;
- Neither sends nor receives any radio communications until activated by ExteNet's CMRS retail customer;
- Does not need a radio license to install the company's backhaul service;
- Lacks a "mobile station," such as a cellphone or other wireless device, on one end of its backhaul service;
- Does not offer CMRS to end user customers; and
- Provides its service exclusively on a wholesale basis, meaning that it is not available to the public.

40. ExteNet provides optical services to business customers, which is a type of telecommunications service.

41. ExteNet, through its fiber, could offer point-to-point service on a wholesale basis in a configuration that does not include a node. ExteNet does not currently offer this service.

X. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding. Tex. Local Gov't Code § 283.058.

2. SOAH has jurisdiction over the hearing in this matter. Tex. Util. Code § 14.053; Tex. Gov't Code § 2003.049.

3. The parties had sufficient legal notice of the proceeding. 16 Tex. Admin. Code § 22.55.

4. ExteNet is a CTP as defined by Texas Local Government Code § 283.002(2).

5. Chapter 283 creates a uniform state-wide compensation scheme for CTPs under which CTPs are granted access to the rights of way in municipalities by paying a fee for access lines rather than entering into a franchise fee agreement. Tex. Local Gov't Code § 283.056(f).

6. ExteNet is providing backhaul service.

7. ExteNet's backhaul service is excluded from the count of access lines. 16 Tex. Admin. Code § 26.465(f)(3).

8. ExteNet's DAS facilities generate no access lines as defined in 16 Texas Administrative Code § 26.461(c)(1)(A)(i-iv).

9. A CTP is required to pay compensation to the municipality in the amount determined by Chapter 283 and the Commission's rules established under Chapter 283.

10. Chapter 283 implements a uniform method for compensating municipalities for the use of the public rights of way that is, among other things: (a) administratively simple to municipalities and telecommunications providers, (b) is consistent with state and federal law, (c) is competitively neutral, and (d) is nondiscriminatory.

11. Pursuant to 16 Texas Administrative Code § 26.465, the City cannot assess an access line fee on ExteNet's facilities because the Commission excluded backhaul facilities from being assessed an access line fee.

12. ExteNet does not provide a "mobile service" as defined by the Federal Communications Act of 1934, Section 153(33).

XI. ORDERING PARAGRAPHS

In accordance with the findings of fact and conclusions of law, the Commission issues the following orders:

1. The complaint filed by ExteNet Network Systems, Inc. has merit and is granted.

2. The City of Houston may not charge ExteNet for use of the City's right of way for ExteNet's DAS system, which provides backhaul.

3. All other motions, request for entry of specific findings of fact and conclusions of law, and any other request for general or specific relief, if not expressly granted, are denied.

SIGNED February 24, 2017.

WENDY K. L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TRAVIS VICKERY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

EXHIBIT B

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

Review of Issues Relating to Commission Certification of Distributed Antennae System Providers in Pennsylvania	**Public Meeting March 2, 2017** **2517831-LAW** **Docket No. M-2016-2517831**

MOTION OF ROBERT F. POWELSON

Before the Pennsylvania Public Utility Commission (PAPUC or Commission) for consideration is the resolution of a formal proceeding to address the relevant regulatory role of the Commission under applicable Pennsylvania and federal law over distributed antennae systems (DAS) facilities and other attendant issues related to DAS networks.

BACKGROUND

Over the last ten years or so, the Commission has certificated DAS network operators,[1] but without any discussion or analysis of their jurisdictional status. Often, the applicant did not identify itself as a DAS operator, but rather described its intended service as simply providing "point-to-point" transport without any recognition of the radio (wireless) component of the service or, if so, described it as "RF [radio frequency] transport" also without recognizing the essential antenna facilities of the DAS network.[2] The DAS network industry has evolved from a small niche player to prominence as a major driver of the wireless industry's build out of end-user customer facing facilities.

The initial inquiry here is whether Pennsylvania law permits the certification of DAS network operators as public utilities and allows the issuance of certificates of public convenience (CPC) as such.[3] We next review the necessity of a CPC to the DAS operators' construction of

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[1] Most recently in the *Application of SQF, LLC for approval to offer, render, furnish or supply telecommunication services as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania*, Docket No. A-2015-2490501 (Order entered November 19, 2015). *See also* the Statement of Vice Chairman John F. Coleman, Jr. and the Dissenting Statement of Commissioner Robert F Powelson.

[2] For example, *see Application of NextG Networks of NY Inc. d/b/a NextG Networks East for approval to offer, render, furnish or supply telecommunication services as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania*, Docket No. A-311354F0002 (Order entered April 8, 2005); *See also* PA PUC Telephone Tariff No. 1, NextG Networks of NY effective April 14, 2005. NextG is now Crown Castle. Crown Castle Comments at 1, n. 1.

[3] Commenters include: The Wireless Association ("CTIA"), The Wireless Infrastructure Association (PCIA), Crown Castle NG East LLC and Pennsylvania–CLEC LLC (Crown Castle), ExteNet Systems, Inc. (ExteNet), various municipal non-profit associations and many individual municipalities also directly participated. The various associations representing, in aggregate, nearly all of Pennsylvania's 2600 municipalities that filed Comments and Reply Comments are the Pennsylvania Municipal League (PML), the Pennsylvania State Association of Township Supervisors (PSATS), the Pennsylvania State Association of Boroughs (PSAB) and the Pennsylvania State Association of Township Commissioners (PSATC) (collectively Municipal Associations) as well as multiple individual municipalities. The Office of Consumer Advocate (OCA) and the Broadband Cable Association of

facilities. Finally, if DAS networks are not public utility facilities under the Pennsylvania Public Utility Code (Code),[4] then we need to identify next steps to address such an outcome.

DAS NETWORKS

DAS networks provide infrastructure on the end-user side of the traditional CMRS carrier's network. This network collects and delivers end-user wireless traffic on a wholesale basis to the retail CMRS carrier.[5] There are three main actors that interact with the DAS network: the retail CMRS provider;[6] the DAS operator itself; and the retail, end-user customer. The retail CMRS provider, also called the wireless service provider (WSP) in the industry comments, is the DAS operator's customer.[7]

> At its most fundamental, a DAS network is composed of three main components:
> (1) Powered antennae and related signal conversion equipment that transmits (and receives) end-user wireless traffic and that converts the protocol (called the "node");
> (2) Some form of terrestrial transport (most likely fiber) that carries the traffic between the DAS and WSP networks; and
> (3) A connection between the two networks, usually located at the WSP's switch or a carrier hotel (called the "hub").[8]

The DAS wireless antennae are placed on existing municipal light posts, utility poles, buildings, and other structures often in the public right-of-way. DAS carriers also construct their own poles and facilities to support the antennae/node.[9] DAS facilities allow WSPs "to expand their networks in a fast, cost-effective and efficient manner."[10]

Pennsylvania also participated. I want to thank everyone for their participation and comments, which have been extremely helpful to us as we have deliberated on this matter.

[4] Some DAS operators assert that they are certificated in other jurisdictions, but do not specifically speak to the law in those jurisdictions. *See, e.g.*, Crown Castle Comments at 1. The Public Utility Code in Pennsylvania, however, specifically prohibits our regulation of CMRS service as a public utility. We also note that "[i]n some states, state law may only require 'registration' or some other form of approval not called a certificate of public convenience." *Id.* at 13, n. 17. In Pennsylvania, there is no registration category in the telecommunications arena; only full public utilities with CPCs. We also note ExteNet's statement that: "ExteNet is also registered with the Federal Communications Commission ("FCC") to provide interstate telecommunications services." ExteNet Comments at 3.

[5] The traffic typically consists of commingled transmissions of voice, data, and video traffic, including Internet traffic.

[6] Mobile cellular service providers such as Verizon Wireless, AT&T Mobility, Sprint, and T-Mobile are traditional, retail CMRS providers in this category. Municipal Association Comments at 4.

[7] The Municipal Associations describe DAS as follows: "DAS is principally a repeater system that extends or boosts a provider's radio frequency ("RF") signals or spectrum from their network to the edge in order to support end user mobile and stationary devices in areas where their signal coverage and capacity are lacking." Municipal Association Comments at 2. We take this as a general description and not necessarily an engineering one. Crown Castle Reply Comments at 9, CTIA Reply Comments at 3.

[8] PCIA Comments at 3. The OCA Comments cite to three different sources for similar summaries of a DAS network. OCA Comments at 3-4.

[9] DAS networks operate indoors and outdoors. In most indoor applications, the network operator is dealing with a single land owner or landlord. The issues addressed by the commenters principally apply to outdoor DAS and the use of public spaces. As the Municipal Association's explain: "Outdoor DAS focuses on bringing coverage to an

The WSP, not the DAS network operator, exchanges voice traffic with the public switched telephone network (PSTN).[11] DAS business plans do not touch the safety and traditional interconnection issues with which the Commission is normally concerned. The DAS network is not responsible for the hand-off to the 911 emergency center – the WPS is accountable for that. DAS operators also do not interconnect with other carriers or the PSTN – that also is handled by the WSP. DAS networks do not need phone numbers – numbering is the WSP's function.

ISSUES INVOLVING DAS SITING

There are aesthetic and engineering advantages to the deployment of the low height antennae that the cell phone industry is increasingly utilizing either in their own systems or through independent, third-party DAS networks. CTIA articulates the industry transition well:

> Traditional "macrocell" infrastructure – huge antennas bolted to enormous towers and other tall structures – has done an excellent job of extending coverage across Pennsylvania and the rest of the nation, and it will continue to play a critical role in maintaining and expanding that coverage. However, continually-increasing consumer usage due to the widespread adoption of smartphones and the development of wireless broadband dependent applications and services, among other factors, has created a voracious demand for additional wireless *capacity* even in areas where *coverage* is ubiquitous. Further, the forthcoming transition to fifth generation ("5G") wireless networks will require even more infrastructure deployment as the wireless industry continues to enhance its network capabilities to the benefit of consumers.[12]

As the FCC has noted, "DAS deployments offer robust and broad coverage without creating the visual and physical impacts of multiple macrocells." Two years ago, the FCC noted that "DAS and small-cell deployments are a comparatively cost-effective way of addressing increased demand for wireless broadband services, particularly in urban areas. As a result, providers are rapidly increasing their use of these technologies, and the growth is *projected to increase exponentially* in the coming years."[13]

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outdoor area where the existing network cannot provide adequate coverage or capacity (e.g. a rural area where the signals cannot reach or a dense urban area where the network cannot provide sufficient capacity). It creates capacity boosts where there is a weak signal. Installation of outdoor DAS is more challenging than indoor DAS, because of the outdoor weather elements creating the need for sufficient structure to support wind-load and secure closets for equipment." Municipal Association Comments at 2.

[10] ExteNet Comments at 2.

[11] See, for example *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, FCC No. 14-153, ¶ 34, 29 FCC Rcd. 12,842 (Report and Order released Oct. 21, 2014), 80 Fed. Reg. 1238 (Jan. 8. 2015) ("*Wireless Infrastructure Order*") at ¶ 31 and ExteNet Comments at 21.

[12] CTIA Comments at 1-2 (emphasis in original).

[13] *Wireless Infrastructure Order* at ¶ 34 (emphasis added).

> The challenge of DAS deployment is principally one of land use: Although the facilities used in these networks are smaller and less obtrusive than traditional cell towers and antennas, they must be deployed more densely – *i.e.*, in many more locations – to function effectively. As a result, local land-use authorities in many areas are facing substantial increases in the volume of siting applications for deployment of these facilities. This trend in infrastructure deployment is expected to continue, and even accelerate, as wireless providers begin rolling out 5G services.[14]

At the urging of the wireless industry, Congress and the FCC have increasingly struggled with the associated wireless facility siting issues, attempting to find the line between the preservation of local zoning rights and the public's increasing demand for added wireless capacity. The FCC's 2009 *Shot Clock Ruling*[15] prescribed specific time frames for municipal review and permitting of wireless towers so that wireless deployment would not be delayed or burdened by unreasonable municipal challenges to siting.[16] The FCC further directed that permit denials must be based upon "substantial evidence," prescribed review of environmental impacts, prohibited discriminatory treatment, and established an accelerated judicial review of permit denials. As part of its consideration of the role of DAS facilities in its 2011 *Pole Attachment Order*, the then-Chairman of the FCC acknowledged that "DAS deployments use multiple antennas to extend wireless coverage and provide service more efficiently than conventional wireless antennas."[17]

Next, in 2012, Congress passed the Spectrum Act,[18] which directed that a State or local government may not deny, and shall approve, any request for a modification of an existing wireless tower or base station.[19] The FCC's ensuing *Wireless Infrastructure Order* implemented this Act, as well as extended all prior zoning privileges to DAS facilities.

Nor has all the action been at the federal level. At the end of 2012, the Pennsylvania General Assembly enacted the Wireless Broadband Collocation Act (Act 191), which provides for a streamlined approval process for certain qualifying wireless collocations, modifications and

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[14] *Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, FCC WT Docket No. 16-421, FCC Notice dated December 22, 2016 ("*Mobilitie Petition*") at 2.

[15] *In Re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, FCC No. 09-99*, 24 FCC Rcd 13994 (Declaratory Ruling Released Nov. 18, 2009) ("*Shot Clock Ruling*"). The FCC *Shot Clock Ruling* presumptively established what constitutes "a reasonable period of time" for a municipality to act in response to an application to occupy a municipal right of way. *Shot Clock Ruling* at ¶ 37.

[16] These rules were extended to DAS facilities in 2014.

[17] Pole Attachment Order, cite at 139 (mandating a time frame for pole and right-of-way owners to provide broadband providers and deployers of wireless broadband technologies like DAS access to utility poles so as not to delay broadband buildout)(statement of Julius Genachowski).

[18] As part of the Middle Class Tax Relief and Job Creation Act of 2012, 112 Pub. L. 96, Title VI, § 6409(a), 126 Stat. 156, 232 (2012) ("Section 6409(a)"), codified at 47 U.S.C. § 1455(a) ("Spectrum Act").

[19] 47 U.S.C. § 1455(a)(1).

replacements of existing facilities, including DAS.[20] Act 191 extends the wireless industry's rights beyond federal law, including a definition of eligible facilities and a 90-day deadline for decisions on license approvals.

REGULATION OF DAS OPERATORS AS PUBLIC UTILITIES

Turning to the threshold jurisdictional inquiry, DAS networks meet the initial legal test of public utility status since they are operating facilities that convey or transmit messages or communications.[21] The more challenging question, however, is whether the DAS operators are doing so by the technology of "mobile domestic cellular radio", a form of service that is expressly excluded from the definition of "public utility."[22]

Such technology-based regulatory differentiation is not unusual. The Pennsylvania General Assembly has also excluded cable phone and any other form of IP-based telecommunications from Commission jurisdiction except for very limited purposes not germane here.[23] Indeed, by these various exclusions, the Commission has very limited jurisdiction over telecommunications services in Pennsylvania and focuses on traditional incumbent and competitive "landline" telephone offerings. No entity that uses facilities that provision mobile services, other than DAS network operators, have sought a CPC from us.[24]

WIRELESS SERVICE

It is clear that DAS facilities are used to provide a wireless service. In its 2014 rulemaking that extended the wireless tower zoning reforms to DAS networks and their antennae, the FCC ruled that these are wireless facilities entitled to the same siting advantages created in the 1996 Telecommunications Act, the 2009 *Shot Clock Ruling*, the 2011 *Pole Attachment Order*, and the 2012 Spectrum Act.[25]

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[20] 53 P.S. §§ 11702.1, *et seq.*

[21] 66 Pa. C.S. § 102; *see* § 102(2)(iv) (relating to exclusions from the definition of "public utility"). ("Any person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for ... [c]onveying or transmitting messages or communications ... by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation ... [except that] [t]he term does not include ... [a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service.").

[22] As we noted in our initial order: "CMRS is a defined term in the federal Communications Act but not in the Pennsylvania Public Utility Code (Code). However, we view CMRS as synonymous with "mobile domestic cellular radio telecommunications service," which is the term used in the Code to describe wireless service." February 23, 2016 Order at 3, n.4.

[23] Voice-Over-Internet Protocol Freedom Act, P.L. 627 of 2008, codified at 73 P.S. § 2251.1 *et seq.*

[24] The Commission did, on one occasion, did agree to certificate a "fixed wireless" operation (i.e., immovable end-user base station in the end-user's premises), which did not ultimately become operational and was not issued a CPC. *Application of Vanguard Telecom Corp., d/b/a Cellular One, for Approval to Offer, Render, furnish, or Supply Facilities-based Competitive Local Exchange Telecommunication Services and Facilities-based Competitive Access Provider Services*; Docket Nos. A-310621 F0002 and A-310621 F0003.

[25] *Wireless Infrastructure Order* at ¶ 271 (emphasis added).

Specifically, the FCC stated that DAS "is used to provide personal wireless service" and the antennae installed by DAS network operators are wireless towers[26] for purposes of federal law. As it described in the *Wireless Infrastructure Order*:

> We clarify that *to the extent DAS* or small-cell facilities, including third-party facilities such as neutral host DAS deployments, *are or will be used for the provision of personal wireless services, their siting applications are subject to the same presumptively reasonable timeframes that apply to applications related to other personal wireless service facilities.*[27]

The FCC's conclusion that DAS networks are facilities that utilize wireless (radio) technology in order to provide personal wireless service is persuasive.[28] The FCC sets the rules for CMRS compensation, availability of capacity, auctioning and management of spectrum, customer information, pole attachments, and all other things that are wireless. The regulatory classification of DAS by the FCC as "personal wireless service" is persuasive as we seek to answer the same question under state law.

Nevertheless, the DAS operators contend in this proceeding that they are providing a *landline* service no different from the typical middle mile, point-to-point, "backhaul service" offered by almost every telecommunications carrier.[29] This position, however, is based upon an incomplete description of the DAS network. Simplified, it asserts that the radio frequency – the spectrum – is owned and transmitted by the retail WSP and only passively carried by the DAS carrier as a throughput on terrestrial facilities.

There are several flaws with this line of reasoning. First, the view that the DAS antenna is passive because it does not generate signal is unreasonably restrictive. Even where the signal is generated at the head end (or hub), the DAS antenna transmits (or receives) the radio signal to (and from) the wireless end-user customer.[30] Moreover, the DAS operator's node provides other active functions such as RF-to-optical-RF signal conversion or simple RF conversion at the node/antenna.[31]

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[26] It is worth reflecting on the fact that no macro tower has ever sought to be certificated by us, only the smaller cells.

[27] *Wireless Infrastructure Order* at ¶ 270. The FCC uses the term "personal wireless services," which it defines as "commercial mobile services, unlicensed wireless services and common carrier exchange access service." 47 USC § 332(c)(7)(C)(i).

[28] The DAS carriers agree that the federal definition should be applied. See, for example CTIA Comments at 10 ("Thus, whether the DAS service provided by CAPs constitutes CMRS under federal law – and thus "mobile domestic cellular radio telecommunications service" under Pennsylvania law – depends on whether it is both a "mobile service" and an "interconnected service" under federal law.")

[29] ExteNet Comments at 16. "In this circumstance, the radios, antennas and facilities qualify as equipment and facilities used to convey communications to the public for compensation, just as traditional wireline transport facilities do."

[30] CTIA Comments at 3.

[31] *Id.* at 3, n. 3.

The DAS operator is operating equipment that plays a vital and active role in a wireless session by providing an antenna that directly interfaces with the end-user's wireless device -- both sending and receiving radio signal. The DAS antenna receives RF at the node, converts it to digital or optical format for transport over a cable or fiber line, only to be converted back to RF at the hub and handed back to the WSP, or the CMRS carrier's ultimate end-user. The fact that the retail WSP holds title to the spectrum license or may generate the signal for the DAS network to carry does not diminish the active collection, conversion, and distribution of the wireless signal by the DAS network.

Nor is it universally true among DAS operators that there is no operator-supplied radio involved or that the retail WSP generates the radio signal back at the hub, as some commenters assert.[32] For example, ExteNet describes its network as supplying radios and generating the radio signal.[33] The FCC notes that small cell operators,[34] one form of microcells, supply radio transceivers at the node.[35]

There is no homogeneity among DAS networks.[36] As the PCIA warns, "it would be a mistake to attempt to define DAS as a specific technological configuration currently deployed by a particular company."[37] I agree that it would be an error to base our ruling on any one narrow view of a network.

Rather, DAS networks should be defined by their functionality (the service furnished), not by any particular configuration of facilities. Our statute excludes from our jurisdiction any person that operates equipment that "furnishes mobile domestic cellular radio telecommunications service." There is no requirement under our law that the service be a stand-alone offering. The term "furnish" as used in the statutory exception means (second definition)

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[32] The CTIA asserts: "The [DAS operators] do not have any radios in their DAS facilities—all radio equipment is provided by the wireless service provider, either in the form of its base station or in the form of its end users' mobile devices." CTIA Comments at 11.

[33] "The nodes are typically deployed with multiband antennas .... Each antenna is connected to small distributed remote radio units...." ExteNet Comments at 6.

[34] The CTIA observes that: "DAS networks should not be confused with 'small cell' (i.e., picocell, microcell, metrocell and/or femtocell) technologies, which are also used to extend coverage and add capacity to wireless providers " CTIA Comments at 4. Later it recognizes the industry confusion over nomenclature: "Crown Castle NG describes its product as a 'small cell solution.' Regardless of nomenclature, the product is a neutral-host, small node, scalable system typical of a DAS." CTIA Comments at 18, n. 44.

[35] *Wireless Infrastructure Order* at ¶ 31.

[36] As Crown Castle acknowledges, even about its DAS network, "there is no single combination of equipment that defines a DAS network." Crown Castle Comments at 3.

[37] "While this description is high-level, it would be a mistake—both technologically and from a legal or policy perspective—to attempt to define DAS as a specific technological configuration currently deployed by a particular company. DAS is a generic description of a network for providing telecommunications service. Like all telecommunications networks, it is evolving rapidly and being deployed in differing manners by different providers. Accordingly, the Commission should avoid trying to set legal or regulatory treatment based on a narrowly-defined technological configuration that does not accurately reflect an evolving market." PCIA Comments at 3.

"to provide" or "to supply."[38] As previously discussed, DAS networks are used to furnish, supply and provide personal wireless services and, thus, meet this definition.

I disagree with the proposition that DAS networks are just like the landline transport facilities that have been traditionally certificated by us. Stated simply, it is the DAS antennae that causes the crossover into the wireless realm and makes the difference under Pennsylvania law. BCAP, representing the cable companies, states that "backhaul transport service is separate and distinct from *the antenna-based service* offered by DAS operators that may also include a transport segment."[39]

Our Order opening this docket specifically asked the DAS carriers to identify "the demarcation point between a DAS provider's network and the provider's network that it serves, as determined in legal agreements or otherwise..." ExteNet, the only commenter to respond to this question directly, reported that "[t]he hub is traditionally the demarcation or 'meet-me' point between the DAS provider and WSP network. The parties may agree to a different point. In newer architectures, the demarcation point is located in the [WPS] carrier's facility."[40] Based upon this explanation, I conclude that the DAS provider is responsible for the facilities that are located between the end-user's device and the WSP hub, not just from the antenna to the hub. This further buttresses the conclusion that DAS facilities are used to furnish a wireless service.

In treating DAS facilities as wireless in nature, the FCC rejected the same arguments that the DAS operators now assert before us, namely that the DAS network is merely terrestrial back haul:

> *Some commenters argue* that the shot clocks should not apply because some providers describe *DAS and small-cell deployments as wireline*, not wireless, facilities. The City of Eugene, Oregon, for example, argues that the Commission should not consider DAS a personal wireless service because one DAS provider has argued that its service is "no different from, and indeed competes directly with, the fiber-based backhaul/private line service provided by Incumbent Local Exchange Carriers." *This argument is not persuasive*. Determining whether facilities are "personal wireless service facilities" subject to Section 332(c)(7) does not rest on a provider's characterization in another context; rather, the analysis turns simply on whether *they are facilities used to provide personal wireless services.*[41]

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[38] http://www.macmillandictionary.com/us/dictionary/american/furnish; https://www.merriam-webster.com/dictionary/furnish; https://en.oxforddictionaries.com/definition/furnish. Black's Law Dictionary confirms that the word "furnish" (first definition) means: "To supply or provide."

[39] BCAP Reply Comments at 1 (emphasis added). I would decline to render any ruling on the jurisdictionality of cable company facilities, although BCAP requests one. We are only dealing with DAS networks at this time.

[40] ExteNet Comments at 7.

[41] *Wireless Infrastructure Order* at ¶ 271 (emphasis added).

The wireless association's rebuttal to this citation is circular.[42] The FCC did not equivocate in applying the label of "personal wireless service" to DAS.[43] The point made in the FCC's *Wireless Infrastructure Order* is that, to the extent a DAS operator employs the FCC's rules regarding siting, it agrees that it is providing "personal wireless service."

State law also bears on this point. At the end of 2012, Pennsylvania enacted the Wireless Broadband Collocation Act (Act 191), which provides for a streamlined approval process for certain qualifying wireless collocations, modifications and replacements of existing facilities, including DAS.[44] Act 191 extends favorable land use rules to and "wireless telecommunications facilities" beyond federal law.[45] DAS operators use these rules, which are applicable to "equipment and network components, including antennas, transmitters, receivers, base stations, cabling and accessory equipment, used to provide wireless data and telecommunications services." Again, by taking advantage of the special siting rules applicable to wireless facilities, DAS carriers implicitly concede that their facilities are used to furnish a wireless service.

MOBILE SERVICE

Continuing, because I propose to conclude that DAS facilities are used to furnish radio (i.e., wireless) services, the only remaining legal issue related to our jurisdictional inquiry is whether the service is "mobile."[46] The FCC has only ruled that DAS operators fall into the general category of "personal wireless service" but has not specified which of the three types are involved: "commercial mobile services, unlicensed wireless services and common carrier exchange access service."[47]

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[42] Interestingly, the individual carriers themselves did not address this important point. However, from the industry association comments it is clear that the operators have availed themselves of the benefits of both the FCC's Shot Clock and the federal Spectrum Act, as well as our state Act 191.

[43] CTIA Reply Comments at 8 (It is clear from the actual language of the Report and Order that the FCC did not "recognize[] DAS providers as PCS," as the Municipal Associations insist, and that the FCC merely clarified that where DAS facilities are or will be used in the provision of PCS, local zoning boards considering siting applications are subject to the deadlines of the Shot Clock Order.') and PCIA Reply Comments at 15-16 (" Rather, it addressed the extent to which DAS facilities qualify for the same siting timeframes laid in the FCC's 2009 'Shot Clock' order. Section 332(c)(7) of the Communications Act differentiates between local government actions that have an impact on personal wireless services and decisions that concern personal wireless service facilities. The FCC did not establish or change any regulatory classification of services provided via DAS networks.").

[44] 53 P.S. § 11702.1, et seq.

[45] Including a definition of eligible facilities and a 90-day deadline for decisions on license approvals. Remedies are in the county courts of common pleas, which decisions are to be rendered on "an expedited basis." There is no role provided for the PUC under Act 191 and the premise of the Act seems incongruous with the "public utility" status of the DAS provider. Because certificated "public utilities" may override local zoning requirements, requiring DAS providers to be certificated as "public utilities" would seem to render the provisions of Act 191 relating to DAS rights on certain facilities within local municipalities unnecessary.

[46] No one argued that the service is not "commercial."

[47] 47 USC § 332(c)(7)(C)(i). The DAS commenters do not assert that they are furnishing either unlicensed wireless services or common carrier exchange access service.

Whether the service is mobile or fixed turns on the end-user's equipment and whether it is mobile under the federal rules, which we will apply here. Incorporating the federal definitions into this analysis, commercial mobile radio is "any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[48] Section 3(27) of the federal Communications Act defines a "mobile service," as "radio communication service carried on between mobile stations or receivers and land stations, and by *mobile stations* communicating among themselves."[49] The Act, in turn, defines a "mobile station" as "*a radio-communication station capable of being moved and which ordinarily does move.*"[50]

The Commenters do not specify the type of consumer equipment with which the DAS networks communicate. My view and the record of this case lead to the conclusion that the wireless communication is to mobile devices such as tablets and smart phones. The DAS operator's comments support this conclusion. The CTIA acknowledges that DAS network transmits "the [radio] signals ... to the end user's *mobile* device."[51] In describing the operation of its network, Crown Castle acknowledges the "radio transmissions between the Node [the DAS antenna] and a carrier customer's subscriber's *mobile* device."[52]

The commenting DAS operators resist application of the term "mobile" on the grounds that they only provide "transport service over fiber optic lines between *stationary* hubs and *stationary* nodes" and deny providing "a service between the Node and any consumer's mobile device."[53] This is a continuation of the position that a DAS network is exclusively using landline facilities to stream the WSP signal that the FCC expressly rejected in its *Wireless Infrastructure Order* and with which this motion concurs. This logic turns all definitions on their head. The large dishes on the macro towers are stationary also, but no one argues that these are part of a fixed, not mobile, service.

Next, the DAS operators argue that they do not provide an "interconnected" service. "Section 332(d)(2) of the Communications Act states that "the term 'interconnected service' means service that is interconnected with the public switched network (as such terms are defined by regulation by the [FCC])."[54] The DAS operators, elsewhere in their comments, concede that calls that flow through their antennae are connected to the public switched telephone network (PSTN). The argument here instead appears to be that the interconnection function is performed by the WPS and not the DAS operator. However, DAS networks provide a WSP's end-user customer with connectivity to the WSP's network, which is interconnected to the PSTN. Thus, DAS service assists in making interconnected voice and/or data service available to end-users a/k/a the public or a substantial portion thereof.

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[48] 47 USC § 332(d).

[49] 47 USC § 3(27) (emphasis added),

[50] 47 USC § 3(28) (emphasis added).

[51] CTIA Comments at 10 (emphasis added).

[52] Crown Castle Comments at 4 (emphasis added).

[53] *Id.* at 11

[54] CTIA Comments at 12.

In conclusion, DAS facilities furnish mobile domestic cellular radio telecommunications service and, hence, cannot be certificated as public utilities under the Code.

EFFECTS OF LOSS OF PUBLIC UTILITY STATUS

As a preliminary matter, I note that the primary adverse consequence of the possible decertification of DAS networks raised by any party relates *solely* to facilities siting – gaining access to public rights of way and zoning permits to deploy new facilities or to connect to existing structures. None of the traditional earmarks of utility regulation – the establishment of just and reasonable rates or the maintenance of reasonable service – are matters of expressed concern by any commenter.

It is argued that decertification of DAS networks would constitute a barrier to entry in violation of federal law.[55] In my view, decertification of DAS does not violate federal law. Certainly, federal law precludes state and local governments from enacting competitive barriers to market entry against DAS network operators. However, I fail to see how allowing DAS networks to operate free from Commission oversight forms one.

Moreover, federal law cannot be used to compel the Commission to certificate a non-utility in violation of state law based on the effects that losing utility status *may* have on a facilities siting regimen administered by other governmental units. Section 253 does not compel the Commission to come to the aid of a non-jurisdictional entity. To the extent that a local zoning board, for example, enacts an unreasonable requirement, it is that local regulation that violates Section 253 and not the Commission failure to offer assistance.

Moreover, federal law expressly preempts any attempt by this Commission to regulate either market entry of, or the rates charged by, an entity providing CMRS.[56] Thus, federal law precludes us from requiring DAS network operators to obtain a CPC.

In any event, predictions regarding the loss of CPC status among DAS network providers range from no significant change forecast by the municipal participants to an apocalypse projected by the DAS network operators.[57] Several commenters who are DAS operators argue that denying CPCs to providers of DAS service may prohibit or may have the effect of prohibiting DAS service in Pennsylvania by impeding their ability to deploy DAS networks in Pennsylvania. According to one commenter, pole owners frequently require proof that the attaching party holds certification from a governmental authority like the Commission. The

[55] Under Section 253(a) of the Communications Act, "[n]o State or local statute or regulation…may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

[56] 47 U.S.C. § 332(c)(3).

[57] See for example: Crown Castle Comments at 17 ("… such an action … would likely discourage innovation… [and] disrupt the marketplace." ; PCIA Comments at 12-13 ("… could well have the legal effect of blocking those providers from accessing public rights-of-way pursuant to 15 Pa. Cons. Stat. § 1511 and the practical effect of the same regarding utility poles."); ExteNet Comments at 2. ("… as a practical matter creates at best a high hurdle to market entry and at worst a barrier to entry.").

commenter adds that local governments in Pennsylvania commonly require the presentation of a CPC as a condition to access public rights-of-way.[58]

I am very mindful of the DAS operator's description of poor treatment at the hands of pole owning utilities and municipal licensing authorities,[59] as well as instances of overreaching by DAS network operators that the municipalities describe. We now explore those specific points of friction between DAS operators and property holders.

POLE ATTACHMENTS

The PAPUC does not regulate pole attachments. The opportunity to do so exists, but the Commission has never triggered the "reverse preemption" provisions of the federal Communications Act.[60] Pennsylvania utilities and pole attachers, therefore, follow the federal rules as designed and administered by the FCC. The FCC recently tightened and strengthened the pole attachment rules, providing lower rates and easier, more efficient attachment by all telecommunications carriers.[61]

DAS commenters argue that pole access often is denied absent "proof" of telecommunications status.[62] ExteNet observes: "As a practical matter, requesting proof of certification is a short cut for utility pole owners. It allows them to avoid expensive, time-consuming research in order to make their own legal determination about what the requesting entity is or is not entitled to by law or regulation."[63] The analogy is that a CPC is "a 'ticket' which demonstrates that the holder is entitled to certain rights and privileges and undertakes certain responsibilities."[64]

At the same time, the DAS commenters acknowledge the FCC has extended pole attachment rights to all telecommunications service providers. Specifically, Section 224 of the federal Communications Act grants pole access rights so long as a company is a telecommunications service provider.[65] This motion expressly recognizes that DAS operators provide telecommunications service. Non-certificated telecommunications providers routinely

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[58] Crown Castle Comments at 13-14, 15.

[59] *Id.*

[60] 47 U.S.C. § 224(c).

[61] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*; WC Docket No. 07-245 AND GN Docket No. 09-51, Report and Order and Order On Reconsideration released April 7, 2011. Under this ruling, wireless carriers have clearly defined access to poles, including pole-tops and benefit from the lowered attachment rate and specified procedures designed to enhance attachment.

[62] ExteNet Comments at 1 ("The … reality is that a DAS provider without a CPC would be unable to document to pole owners that it is a telecommunications provider, and therefore entitled to access to poles at reasonable rates… This creates a barrier to entry contrary to Section 253(a).").

[63] ExteNet Comments at 19.

[64] *Id.*at 18.

[65] PCIA Comments at 10 (".. technically, certification by a state commission is not required for a provider to access poles. … Nonetheless, telecommunications providers often encounter opposition." PCIA at 10.

gain access to poles, evidencing that a CPC is not required to attach to poles.[66] Thus, no CPC is required for DAS facilities to attach to utility poles.

I decline to issue certificates as a "shortcut," because of alleged unreasonable practices surrounding pole attachments. But, I would also find that it is be illegal for any utility to require a CPC from this Commission as a requirement for allowing a telecommunication service provider to exercise its pole occupancy rights.[67] While the Commission does not regulate pole attachments, going forward, the Commission should entertain complaints alleging deteriorated pole access by electric and telephone public utilities as alleged violations of § 1501 of the Public Utility Code[68] and subject to fines and penalties.[69]

We also note that DAS carriers may register with the FCC to provide interstate telecommunications services,[70] and suggest that the DAS operators employ the fact of registration as proof of "telecommunications" status to the extent that "proof" is necessary.

In conclusion, loss of a CPC does not affect a DAS operator's rights to attach to utility poles.

PUBLIC RIGHT OF WAY OCCUPANCY

The DAS carriers also complain about the behaviors of local municipalities in granting them occupancy in public rights of way. Specifically, the DAS operators claim that "certification is also critical" to a provider's access to public rights of way, because "[u]nder Pennsylvania law, access to the public right-of-way is available [only] to 'public utility corporation[s]'"[71] citing to 15 Pa.C.S. § 1511(e).[72] I disagree. While this statutory section does

[66] Municipal Association Reply Comments at 4 ("Throughout the Commonwealth, cable operators of all sizes routinely negotiate pole attachment agreements and still manage to maintain a profitable business model and serve Pennsylvania residents. It would seem that the wireless industry's fear of a pole attachment Armageddon is negated in its entirety with proper utilization of the rights and benefits conferred by the Pole Act. (See PCIA Comments, page 10, explaining that a DAS provider "without a CPC will face opposition, impediments, and potentially outright barriers to accessing the critical infrastructure.").

[67] To the extent that current pole attachment agreement require a telecommunications service to also hold a CPC from this Commission, we note that such a provision would also violate our ruling here today.

[68] 66 Pa. C.S. § 1501.

[69] When Gamma Ventures sought a Commission certificate, we so warned all public utilities that access to utility poles is an existing right of all telecommunications carriers that does not require a certificate from this Commission. *In Re Application of Gamma Ventures, LLC for Certificate of Public Convenience and Necessity to Provide Telecommunications Services in Pennsylvania*, PA PUC Docket No. A-2014-2412630 (Order entered June 19, 2014). This warning is once again provided as part of this proceeding. To ensure that pole owners are aware of our concerns, this order should be served upon the association representing them and published in the Pennsylvania Bulletin.

[70] ExteNet Comments at 3.

[71] PCIA Comments at 11. See also Crown Castle Comments at 15 ("For access to public rights-of-way, possessing a CPC may be even more critical... therefore get access to the public rights-of-way, the company must be a "public utility corporation.")

[72] 15 Pa.C.S. § 1511(e) ("A public utility corporation shall have the right to enter upon and occupy streets, highways, waters and other public ways and places for one or more of the principal purposes specified in subsection

address public utility access to rights of way, it does not preclude non-certificated entities from also occupying public rights of way, and such access is guaranteed for DAS operators through other laws.

The 1996 Telecommunications Act clearly prohibits any state or local action that would prevent the placement of DAS facilities in public rights of way:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[73]

The 1996 Act expressly recognizes, but also limits the use of local right of way regulation:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, **on a competitively neutral and nondiscriminatory basis**, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[74] The municipalities concede the requirement to allow public right of way access is obligatory regardless of the possession of a CPC:
>
> Under Section 253(a) of TA-96, if a wireless provider, such as those that utilize DAS systems as a part of their CMRS, can demonstrate a need for its proposed facility, that provider cannot be blocked from installing and operating such facilities by the local zoning authority. By virtue of the fact that DAS systems are typically constructed to infill specific existing capacity and coverage gaps, the DAS provider need only demonstrate the need for such facilities to the local zoning authority and comply with reasonable standards to gain approval for construction, modification and/or placement of facilities in the public rights-of-way.[75]

Furthermore, the commenters raising concerns about public right of way access fail to consider the rules established under state and federal law to facilitate the deployment of wireless facilities, including DAS networks. As noted previously, there

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(a) and ancillary purposes reasonably necessary or appropriate for the accomplishment of the principal purposes, including the placement, maintenance and removal of aerial, surface and subsurface public utility facilities thereon or therein.").

[73] 47 U.S.C. §253(a).

[74] 47 U.S.C. §253(c) (emphasis supplied).

[75] Municipal Association Comments at 12. See also, Municipal Association Comments at 15 ("A DAS provider does not need public utility status to site its facilities and/or equipment to provide service in Pennsylvania. The right of a DAS provider to access the public rights-of-way to either install new poles, or to attach to existing infrastructure, is not diminished by the refusal to grant a CPC to that provider. First and foremost, a DAS provider still has the ability to locate its facilities on poles and other infrastructure in the public rights-of-way.")

have been three recent developments that have granted greater and better defined public right of way access to wireless facilities, including DAS network facilities. The FCC's 2009 *Shot Clock Ruling;* the FCC's *2014 Wireless Infrastructure Order* (implementing the federal Spectrum Act of 2012); and, finally, the Pennsylvania Wireless Broadband Collocation Act of 2012 (Act 191),[76] have narrowed time frames, required written bases for municipal action, and limited the grounds for rejection. In other words, DAS access to rights of way is robust and becoming more so due to efforts that have nothing to do with the issuance by this Commission of a CPC.

In conclusion, I see no benefit conferred upon DAS operators for public right of way occupancy that they would not have in the absence of a CPC.

OVERRIDING ZONING RULES AND EXERCISING EMINENT DOMAIN

One of the most troubling aspects of this case stems from the fact that the Pennsylvania General Assembly has conferred special powers on certificated public utilities, including an exemption from local zoning rules and the power of eminent domain.[77] Other industries, such as retail CMRS or cable companies, which also compete in the telecommunications space, do not possess such rights.

By granting a CPC, the Commission simultaneously confers DAS operators with the powers of eminent domain and special exemption from local zoning regulations that apply to utility structures other than buildings. [78] These are powerful rights, preserved for special industries and carefully written into our corporate statutes.[79]

The Municipal Associations describe the use of these powers:[80]

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[76] The various individual municipal comments also recognize the DAS carriers' rights in this regard. City of Allentown Comments at 2, City of Philadelphia Comments at 2, City of Wilkes Barre Comments at 2 ("Moreover, there are ample federal and state zoning laws and regulations that protect wireless providers, including DAS contractors. These include, but are not limited to, the 1996 Telecommunications Act, the FCC's Wireless Infrastructure Order, the FCC's 2009 "Shot Clock" Order, and the PA Wireless Broadband Colocation Act of 2012. In short, DAS contractors are strongly protected under federal and state law without having to grant them utility status.")

[77] Section 1103 of the Business Corporation Law (BCL) defines "public utility corporation" as including "[a]ny domestic or foreign corporation for profit that ... is subject to regulation as a public utility by the Pennsylvania Public Utility Commission or an officer or agency of the United States." 15 Pa. C.S. § 1103.

[78] *See Duquesne Light Co. v. Upper St. Clair Twp., et al.*, 105 A.2d 287 (Pa. 1954) (*Duquesne*; *South Coventry Twp. v. Philadelphia Elec. Co.*, 504 A.2d 368 (Pa. Cmwlth. 1986) (*South Coventry*); and *Heitzel v. Zoning Hearing Bd. of Millcreek Twp., 533 A.2d 832, 833 (*Pa. Cmwlth. *1987).*

[79] 15 Pa.C.S. § 1511(a).

[80] Municipal Association Comments at 17 ("With a CPC in hand, they often argue that they are not subject to any type of municipal regulation, including basic zoning requirements.... Furthermore, DAS providers often argue that they are entitled to use their public utility status for access to municipal and state-owned property for the placement of facilities and equipment.")

> CPC issuance to DAS providers pits municipal zoning authority (as preserved by TA-96 and recognized by the FCC in its October 2014 Report and Order) against the rights and privileges associated with Commission certification. It creates an adversarial framework that impedes the interaction between local zoning authorities (i.e., Pennsylvania municipalities) and the wireless industry. The industry's belief that CPCs allow DAS providers unrestricted access to the public rights-of-way – like traditional public utilities enjoy– and to install their wireless facilities without proceeding through the municipal zoning process or gaining any type of municipal approvals, is misplaced.[81]
>
> This is troublesome and creates an opportunity for competitive, for-profit companies to legally "take" private property. It also opens the door for situations in which DAS providers are able to use the Commission's certification to access private property without having to negotiate with the property owner. Surely this was not the intention of the General Assembly when it created the Public Utility Code and outlined the rights and benefits to which a traditional, certificated public utility should be entitled.[82]

The individual municipal comments echo this concern:

> Public utilities can legally take ownership of virtually any public or private property so long as they provide the property owner with just compensation. This is one of the most intrusive powers that could ever be conferred upon a governmental entity, let alone a private company.[83]

Even without a CPC, however, DAS operators will still have the property zoning and occupancy rights under the many, various protections previously catalogued in this motion.[84] Moreover, these rights are protected by federal law specifically for wireless facilities (in addition to the broader protections of § 253):

> The regulation of the placement, construction, and modification of personal wireless service facilities [[85]]by any State or local government or instrumentality thereof *...shall not unreasonably discriminate* among providers of functionally equivalent services; *and shall not prohibit or have the effect of prohibiting the provision of personal wireless services.*[86]

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[81] Municipal Association Reply Comments at 7-8.

[82] *Id.* at 7.

[83] City of Allentown Comments at 2, City of Philadelphia Comments at 2, City of Wilkes Barre Comments at 2.

[84] We also note the likelihood that the FCC is set for another round of wireless facility siting review. *Mobilitie Petition*, FCC Notice dated December 22, 2016.

[85] As noted previously, the FCC has ruled that DAS networks are "personal wireless service facilities" in the *Wireless Infrastructure Order* and extended these rights to them.

[86] Section 332(c)(7) of TA-96. This same section compels zoning action "within a reasonable period of time" and be "in writing and supported by substantial evidence contained in a written record..." These rights have been

As previously discussed, similar zoning rights are guaranteed to DAS operators under Act 191.

Upon review, the only property rights that DAS network operators would forgo with the loss of certificated public utility status would be the power of eminent domain and to override local zoning rules. This outcome is appropriate in my opinion and is consistent with the federal and state approach to the siting of wireless facilities, which is one of streamlining local zoning and not overriding it. The property rights granted to traditional public utilities are based upon the concepts of natural monopoly, universal obligation to serve the public, protection of the public from unjust or discriminatory charges and inadequate service. These concepts have no application here. DAS operators have sought CPCs is to obtain the property rights associated with public utility status.

No statute or regulatory rule has granted such powers to DAS facility operators. The General Assembly has been enduringly silent on the issuance of CPCs to DAS operators. Indeed, Act 191 *applies and shapes the zoning rules applicable* to wireless facility siting. It does not override them. Also, Act 191 recognizes no special corporate status for DAS operators under the Public Utility Code. Nor was the Commission given any authority or asked to play any role under Act 191. Oversight of zoning disputes over wireless facility siting was given to "the courts of common pleas of the county where [the facility] is located."[87] The same is true under federal law.[88]

In summary, the premise of these enacted statutes and rules is incongruous with granting "public utility" status to the DAS network provider. Certificating DAS carriers as "public utilities" with the right to override local zoning requirements renders the provisions of Act 191, for example, unnecessary. By certificating, the Commission extends the DAS operators rights beyond those intended for them by the Pennsylvania General Assembly under Act 191 and the Congress by the Spectrum Act.

I am not comfortable providing greater property rights to any industry than are defined by the General Assembly.

CONCLUSION

This Commission has issued certificates to DAS network as far back as 2005, when the industry was in its nascent stages and without any discussion or debate. It has continued to grant CPCs, but has increasingly questioned the legality and need of doing so given the heightened DAS siting activity in recent years and the associated controversies.

The explosive deployment of DAS networks in in the last two or three years has caused the Commission to open this docket to evaluate the prudence and effect of issuing CPCs to a

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improved (from a DAS perspective) subsequently under the *Shot Clock Ruling* and the *Wireless Infrastructure Order*.

[87] 53 P.S. § 11702.5(a).

[88] 47 USC § 332(c)(7) ("... commence an action in any court of competent jurisdiction").

portion of the wireless industry whose business focus is the deployment of towers and antennae that extends and makes WSP deployment, particularly CMRS, more robust.

Since those original certifications, DAS facility operators have developed a more favorable environment for ensuring that their equipment can be effectively positioned without a certificate from the PUC. The Pennsylvania General Assembly and Congress have enacted statutes that expressly define and grant the property rights necessary to deploy wireless networks. Moreover, the FCC has issued several decisions further bolstering these rights. These actions obviate the DAS operators' objective in seeking the Commission's certification in the first place – gaining property rights for wireless facility siting. These efforts are ongoing and will further refine DAS operator property rights.

Today, I conclude that DAS operators are operating networks that furnish service to wireless mobile devices. Given that our enabling state statute unequivocally places the operation of CMRS facilities outside of our regulatory purview and based upon the comments presented here, this motion declares DAS networks to be beyond the Commission's regulatory reach.

DAS networks are not public utilities under Pennsylvania state law. As articulated above, where a carrier operates an antenna, the function of which is to receive and transmit wireless radio, the service is more than simply terrestrial, wireline back haul and, I have concluded that, the facilities provide CMRS.

I fully support the deployment of broadband services, no matter the medium. The Commission is not authorized, however, to grant super property rights to DAS networks and I decline to exceed the statutory authority granted us by the General Assembly.

NEXT STEPS

In view of the forgoing analysis, if the DAS industry seeks the affirmative conference of "public utility corporation" rights, the debate needs to be transitioned to General Assembly and/or Congress. I would also note state legislatures around the country are enacting further reforms for wireless facility deployment.[89] Were such an effort to come to Pennsylvania, the Commission would welcome the opportunity to participate if invited to do so.

Going forward, absent a change of law, the Commission will not issue certificates of public convenience to companies for the operation of DAS networks and certificates may not be used for the placement of DAS network facilities.

[89] In Arizona, SB 1214 would allow an entity to install, operate, and maintain microcell equipment and small cell equipment in the public highways within a political subdivision under certain conditions. In California, SB 649 would apply the prohibitions that relate to the siting of wireless telecommunications facilities in the public rights of way to the approval of small cell facilities. HF 380 in Iowa proposes specific "rules and limitations" for the application for and deployment of small wireless facilities. In Virginia, SB 1282, a bill that seeks to provide a uniform procedure for the way in which wireless infrastructure is approved by localities and installed in the public rights of way has been sent to the Governor for his signature.

As to existing certificates issued to DAS network operators, the Commission staff will undertake research and engage in individual discussions with those companies to determine whether their certificates should be rescinded. The Commission's actions do not affect the placement of any facilities that occurred while a DAS operator may have held a CPC from this Commission. On the other hand, existing certificates shall not be used to define property rights to construct new DAS facilities.

The technology will undoubtedly change and basing our ruling upon a particular configuration of facilities would not be advisable. However, the facilities that provision CMRS include the antennae[90] itself, as well as associated radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and associated equipment. Any proposed new tower structure built for the sole or primary purpose of supporting the antenna and associated facilities would also be included in facilities excluded from public utility status under the Public Utility Code.

As noted by both the Office of Consumer Advocate and the PCIA, there are a variety of wireline-based backhaul carriers that the Commission certificates and it is not our intention to foreclose DAS carriers from obtaining a certificate for that line of business.[91]

If the company provides other services that are within the Commission's jurisdiction, this motion permits the company to amend its initial application with supporting data thereto. In so doing, the Commission will remove the DAS network aspect from the prior orders granting certification and focus strictly on the wireline portion of the company's business model.[92]

THEREFORE, I MOVE:

1. That Law Bureau prepare an Opinion and Order consistent with this Motion.
2. That within 90 days of the entry date of this order, the Bureau of Technical Utility Services (BTUS) complete an investigation of previously-granted certificates of public convenience for the purposes of identifying carriers engaged in the construction and operation of DAS networks.
3. That within 180 days of the entry date of this Order, BTUS complete an examination of those previously-certificated companies identified as DAS carriers for the purpose of determining whether or not such companies provide other services within the Commission's jurisdiction. BTUS may ask for additional time as needed.
4. That BTUS issue revised orders clarifying the certificates of DAS network operators that offer services other than CMRS as defined in this motion.
5. That BTUS refer DAS-only companies to Law Bureau for the purposes of issuing default orders to rescind their CPCs upon 30 days' notice in accordance with due process.

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[90] The FCC's rules, while not binding upon us are helpful. Section 17.2(a) defines "antenna structure" as including "the radiating and/or receive system, its supporting structures and any appurtenances mounted thereon." 47 C.F.R. § 17.2(a).

[91] PCIA Comments at 8.

[92] As part of this process, BTUS may also investigate claims of zero intrastate revenues, which may be a separate basis for rescinding existing or declining to issue new certificates to offer intrastate services.

6. That BTUS notify the Secretary's Bureau to revoke the provisional authority of any pending applications of DAS-only networks and return those applications as unfiled.
7. That a copy of this order be served on the Energy Association of Pennsylvania, the Pennsylvania Telephone Association and the Broadband Cable Association of Pennsylvania
8. That a copy of this order be published in the Pennsylvania Bulletin.

Date: March 2, 2017

Robert F. Powelson

ROBERT F. POWELSON
COMMISSIONER

EXHIBIT C

City of Gaithersburg
31 South Summit Avenue
Gaithersburg, Maryland 20877

Mayor and City Council Work Session Agenda
City Hall - Council Chambers
Monday, May 22, 2017, 7:30 PM

Final Revisions

- **Right-of-Way Use and Franchise Agreement**

I. CALL TO ORDER

II. ANNOUNCEMENTS

A. Executive Session

B. No Work Session

III. DISCUSSION TOPIC

A. Discussion of Regulations for Small Cell Facilities and Distributed Antenna Systems (DAS)

IV. CORRESPONDENCE

A. Outside

V. ADJOURNMENT

To confirm accessibility accommodations, please contact Doris Stokes at 301-258-6310, or email DStokes@gaithersburgmd.gov.

Please turn off all cellular phones and pagers prior to the meeting. Hand held signs brought may not be displayed in a manner which disrupts the meeting, blocks the view of spectators or cameras and poses a safety concern [e.g., signs mounted on stakes]. Your cooperation is appreciated.

The public is invited to attend and observe this session, but except in instances when the committee expressly invites public comments, no member of the public may participate in the discussions. The public may submit written comments to the committee staff liaison to be forwarded to the committee for its consideration. The City of Gaithersburg welcomes citizen involvement on committees. Please visit the City's website at www.gaithersburgmd.gov for vacancies.

ANNOUNCEMENTS

The Mayor and City Council of Gaithersburg will not conduct a work session on Monday, May 29, 2017, due to the Memorial Day Observance.

The next Mayor and City Council Regular Session will be held Monday, June 5, 2017, at 7:30 PM.

Call to Order

Announcements

CLOSED EXECUTIVE SESSION

Notice to the general public is hereby given that the Mayor and City Council of Gaithersburg plans to conduct a closed executive session immediately following its session on Monday, May 22, 2017, at City Hall. The meeting is proposed to be closed pursuant to the General Provisions Article of the Annotated Code of Maryland, Section 3-305(b)(8) consult with staff, consultants, or other individuals about pending or potential litigation. The topic to be discussed is the Public Service Commission. The closed executive session will be held pursuant to a motion properly adopted during the session of the Mayor and City Council on Monday, May 22, 2017.

ANNOUNCEMENT

Notice to the general public is hereby given that the Mayor and City Council of the City of Gaithersburg will not conduct a work session on Monday, May 29, 2017 due to the observance of Memorial Day.

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The next regular meeting of theMayor and City Council will be held on Monday, June 5, 2017, 7:30 p.m. at City Hall.

Discussion Topic

Mayor and City Council
Agenda Item Request

Meeting Date: 5/22/2017 **Type: Work Session Discussion**

Call to Podium:
Lynn Board, City Attorney
Joe Van Eaton, Outside Counsel
Dennis Enslinger, Deputy City Manager

Agenda Item Title:
Discussion of Regulations for Small Cell Facilities and Distributed Antenna Systems (DAS)

Responsible Staff and Department:
Lynn Board, City Manager's Office
Dennis Enslinger, City Manager's Office
Frank Johnson, City Manager's Office

Desired Outcome from Council:
Conduct work session, provide staff guidance, and establish a 30-day comment period.

Public Hearing History	
Introduction Date:	
Advertisement Date :	
Public Hearing Date:	
Record Held Open Date:	
Policy Discussion Date:	
Anticipated Adoption Date:	

SUPPORTING BACKGROUND ON NEXT PAGE

Mayor and City Council
Agenda Item Request

Supporting Background Information:

Staff presented options for the development of regulations to allow for the development of small cell facilities and DAS while balancing the impacts of deployment on City residents at the February 13, 2017 Work Session. Based on the direction provided by the Mayor and City Council at that meeting, staff, working with outside counsel has developed a three-part structure for the approval of such facilities:

1. Entry into a Franchise/Right-of-Way Use Agreement;
2. Amendments to the City Code to provide for Right-of-Way regulations; and
3. Development of Regulations

Staff is seeking input on a number of key issues so that a Franchise/Right-of-Entry Agreement, Text Amendment and Right-of-Way Regulations may be finalized for consideration by the Mayor and City Council at future public meetings.

SMALL CELL FACILITES IN THE PUBLIC RIGHT-OF-WAY

Mayor and City Council

Work Session

May 22, 2017

EXAMPLES OF SMALL CELL FACILITIES IN OTHER COMMUNITIES






BACKGROUND

- The Mayor & City Council initially reviewed the concept of small cell facilities at an April, 2016 Work Session
- The City retained outside counsel, Best, Best & Krieger Attorneys at Law, in April 2016 to provide guidance on this issue
- Staff met with community representatives on July 13, 2016
- Staff presented options regarding the City's approach to small cells on February 13, 2017

AGENDA

- Tonight, staff will present:
  - A draft Franchise/Right-of-Way Use Agreement for public comment
  - Potential ordinance provisions to address small cell facilities in the right-of-way (ROW)
  - Options regarding the regulatory requirements for small cell facilities
- Staff is seeking guidance from the Mayor & City Council on the proposed documents

Review and Comment Period

- Concepts and documents presented tonight are intended to be for discussion purposes and not final documents
- Staff recommends a 30-day period to allow for industry and public review and comment on the concepts and documents discussed
- Further, staff drafts will be prepared following the comment period for consideration by the Mayor and Council and further public comment in public proceedings

KEY ELEMENTS OF FEDERAL REGULATIONS

- No regulation can be enacted which prohibits the provision of personal wireless services
- When regulating, may not "unreasonably discriminate" among providers of functionally equivalent services
- Applications have to be approved by the City in a "reasonable period of time." Time frames range from 60-150 days
- Decisions for denial shall be in writing and supported by substantial evidence in a written record
- Regulations may not be based on environmental effects of radio frequency emissions if emissions are in compliance with FCC regulations
- Rules do not apply to government acting in proprietary capacity (as owner of structures/property)

MARYLAND PUBLIC SERVICES COMMISSION AUTHORITY

- Section 2-112 provides the general authority of the Maryland Public Services Commission (MPSC) to regulate public service companies
- Under the definitions Section 1-101, public service companies include telephone companies. However, it specifically denotes that a telephone company does not include a cellular telephone company, and among other things specifically authorizes only placement of telephone lines.

FCC PROCEEDINGS

- Update on Mobilitie petition proceeding
- Proposed FCC Rulemakings
  - Scope of proceedings
  - Time frame for response
- Broadband Deployment Advisory Committee Working Groups

PROPOSED STRUCTURE OF SMALL CELL REGULATIONS

- Staff recommendation (three-part structure):
  - Requirement to enter into a Franchise/Right-of-Way Use Agreement
  - City Code Revisions
    - Chapter 19, §§19-7, 19-9A
    - Chapter 20, §20-62
    - Chapter 24, §§24-1, 24-167A
  - Development of comprehensive regulations adopted by the Mayor and Council

FRANCHISE/RIGHT-OF-WAY USE AGREEMENT

- Agreement would establish the terms and conditions for an individual company to install and operate small cell and DAS facilities in the public rights-of-way
- Agreement creates standard provisions to ensure that the provision of personal wireless services is allowed, while not discriminating among companies that provide functionally equivalent services
- City may separately establish a master license for use of structures City may own or control that may be useable for placement of wireless facilities

FRANCHISE/ROW AGREEMENT

- Key Provisions in Agreement:
  - Installations in accordance with City adopted regulations
  - Provides for pole attachment and franchise fees
  - Establishes permitting and construction standards
  - Provides for inspection, maintenance of facilities and poles
  - Provides for removal and restoration of facilities and poles when use is abandoned
  - Provides for pole reservation process to limit the proliferation of poles
  - Indemnification and liability protections

PROPOSED ORDINANCE AMENDMENTS

- Purpose:
  - To allow for the adoption of detailed right-of-way standards via regulation by the Mayor and Council
  - Provide definitions and clarity regarding regulations of facilities in public rights-of-way versus on private property
- Future Revisions: Outside Counsel has suggested updates to the City's ordinances addressing facilities on private property

CODE AMENDMENTS

- Chapter 19 –
  - §19-7 adds definitions of *public easement* and *public facilities*
  - §19-9A:
    - (c) adds that permits for placement of facilities or utilities shall be subject to Right-of-Way regulations
    - (c)(5) adds requirement that permits are subject to permittee obtaining all required consents, licenses or franchises from the City

CHAPTER 20 AMENDMENTS

- Under subdivision provisions:
  - § 20-62 – Requires that construction of all facilities or utilities, whether public or private, are subject to the provisions of §19-9A and the Right-of-Way regulations adopted by the City Council

ZONING ORDINANCE AMENDMENTS

- §24-1:
  - Adds definitions of *public property, reception antenna,* and *right-of-way*
  - Amends definition of *telecommunications facility* and deletes the definition of *telecommunications facility, small cell* to create a tiered approach that applies different levels of review based on the physical characteristics, location and potential impacts of facilities
  - Amends definition of *tower*
- §24-167A(d): Allows private telecommunications facilities within a City right-of-way subject to the adopted regulations

ISSUES CONSIDERED DURING THE DEVELOPMENT OF POTENTIAL REGULATIONS

- Regulations at the federal and state levels
- Placement on existing facilities owned by other investor utility entities
- Pole and equipment sizes and locations
- Retrofitting of existing light poles
- Possible replacement of existing street lights
- Separate pole installations
- Design, color and type of pole
- Long-term maintenance issues

RECOMMENDED APPLICATION PROCESS

- Applicant will be required to submit a pre-approval form and have a pre-submission meeting. *(There will not be a fee for this portion of the process)*
- Staff will sign-off that there is sufficient information to review a formal small cell telecommunications facility in the ROW application *(There will be an application fee)*
- Staff will then review the formal application and determine if any additional information is needed within the appropriate time frame *(shot-clock)*
- Staff will then make a finding based on the criteria listed in the Wireless ROW Regulations as approved by the Mayor and City Council
- Appeals of a staff findings will be reviewed by the Mayor and City Council

PRE-SUBMISSION DOCUMENTS

- Technical description of the proposed facilities with detailed diagrams accurately depicting all proposed facilities and support structures
- Study showing that there is a need for the proposed facilities at the location proposed; type of study will depend on proposed facility
- Certified analysis showing that the new facility, in addition to any existing facilities, meets the FCC's RF exposure guidelines
- Detailed deployment plan describing construction planned for the 12-month period following issuance of a permit and a description of the completed deployment
- Statement describing the applicant's intent with respect to collocation

PRE-SUBMISSION DOCUMENTS

- Statement demonstrating the permittee's duty to comply with applicable safety standards for proposed activities in the City's rights-of-way
- Copy of executed Franchise/ROW Agreement with City approving use of ROW
- Copy of the Maryland Public Services Commission authority to operate in the ROW as a public utility
- In the case of a proposed attachment to an existing investor owned utility pole located in the City rights-of-way, an executed Attachment Agreement with the utility pole provider

PRE-SUBMISSION DOCUMENTS

- In the case of a proposed attachment to a City-owned facility located in the City rights-of-way, an executed Attachment Agreement with the City *(should the Mayor and City Council decide to allow)*
- In the case of an applicant requesting the installation of the a new pole, a statement of how the applicant intends to meet Md. Code Ann., Public Services and Utilities Art. Division I, Title 7 or Title 8, as amended from time to time, which limits new pole construction to only the purpose of supporting telephone lines to provide telephone service
- Any additional information City may require to adequately review final application

GENERAL CONCEPTS

- These regulations are meant to apply to fixed wireless facilities used in providing personal wireless services; additional regulations regarding the use of ROW for cable, wire, optical fiber or private wireless services will be developed and adopted with these regulations
- This would include installation of underground lines and box size equipment requirements for other uses such as electrical, telephone, cable, fiber, etc.
- Fees for use of the ROW, will be addressed in the Franchise/Right-of-Way Agreement and City Fee Schedule

GENERAL REQUIREMENTS

- No Interference: If facilities interfere with construction, operations, maintenance, repair or removal of City improvements, the owner shall be responsible at its own cost to protect, alter or relocate
- Licenses and Permits: Owner will be required to secure all applicable licenses and permits
- No Obstructions: Facilities shall not interfere with public safety activities; pedestrian, bicycle and vehicular transportation activities, or other public activates

GENERAL REQUIREMENTS

- Accommodation of Permanent or Temporary Relocation of Facilities: Relocation in times of emergency, temporarily for major City events, or construction of City improvements will be at owners expense and shall hold the City harmless
- City Rules: To the extent possible by law the City reserves the right to modify regulations at any time

-30-

GENERAL DEFINITIONS

- Base Station: Mobile telecommunications equipment for reception and/or transmission such as microcell antennas and associated equipment (amplifiers, connective cabling, batteries) to support the facility
- Equipment Housing: Mobile telecommunications equipment such as amplifiers, batteries, etc. This excludes the electrical meter and any associated antenna. (Note: The Regulations to provide a volume greater than 2.8 cubic feet and maximum dimensions of 13 inches by 9 inches by 4 inches
- Stick-Type Antenna: No more than 2 inches in diameter and extending no more than 36 inches in length
- Omni/Dome Antenna: Not more than 16 inches in diameter and 4 feet in height

GENERAL DEFINITIONS (CON'T.)

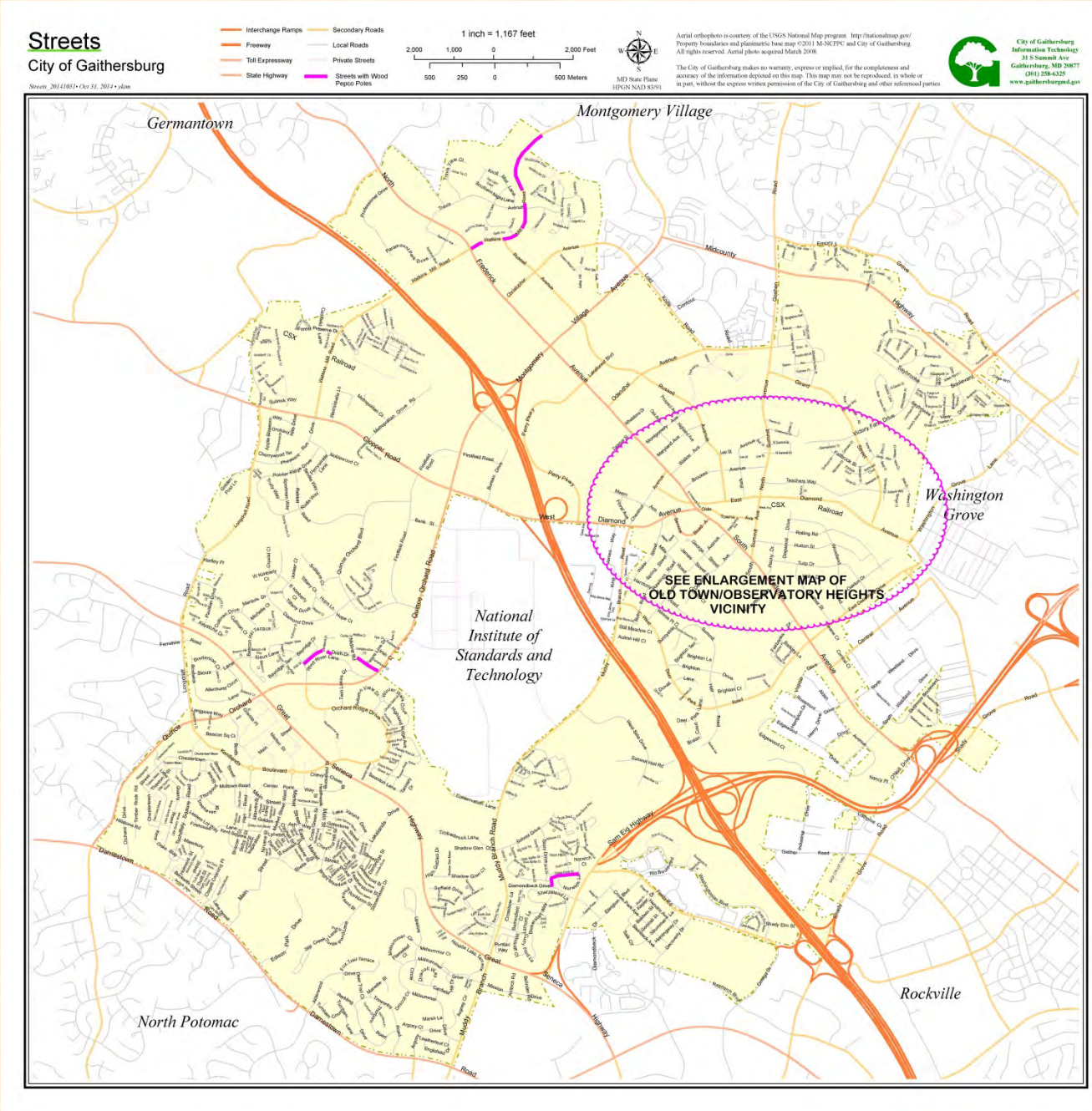
- Interconnecting Wire Cabling: Wire or cabling connecting the Equipment Housing and Antenna. Also includes any underground power or other supporting wire interconnections to third party providers of connectivity (fiber)
- Mid-Wire Base Stations: Mobile telecommunications equipment for reception and/or transmission that are installed on existing above ground wires are not required to meet these regulations if they are less than 1 cubic foot in width and have maximum dimensions of 12 inches by 8 inches by 6 inches

EXISTING UTILITY POLE EXAMPLES FROM OTHER COMMUNITIES

DECISION POINT
INVESTOR OWNED EXISTING UTILITY POLES (IOP)

- Absent a special finding by the Mayor and City Council
  - A wireless facility may only be installed on investor-owned (Pepco/Excelon, etc.) existing utility poles or street light poles (IOP); and
  - Only entities authorized by the Maryland Public Services Commission pursuant to MD Code Ann., Public Utilities Art., 5-410, 8-103, as amended from to time, may erect new poles in the City's ROW, and only then for the purpose of supporting telephone lines to provide telephone service

AREAS OF THE CITY WITH EXISTING UTILITY POLES IN CITY ROW



RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Design of Base Station Equipment

- Equipment Housings - No more than one equipment housing, which may enclose or consist of equipment for one or more cell providers, may be installed on an individual pole
  - Equipment housing shall be no greater than 2.8 cubic feet with maximum dimensions of 13 inches by 9 inches by 4 inches
  - Equipment housing must be mounted on the vertical shaft portion of the pole, be a minimum of 15 feet from the ground, and not project over the roadway or pedestrian path/sidewalk

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Design of Base Station Equipment

- Antennas
  - Stick-Type Antennas - Up to 2 stick-type antennas may be installed for each base station. Each stick-type antenna shall be no more than 2 inches in diameter and extending no more than 36 inches in length, extending vertically from the base either at the top of the pole or on the related equipment housing. No antenna can be installed in the “bishops crook” or on a horizontal member
  - Omni/Dome Antenna – A single omni/dome antenna may be installed in place of two stick-type antennas if it is no greater than 4 feet in height, no wider than 16 inches, and is installed on top of the pole

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Design of Base Station Equipment

- Interconnecting Wire/Cable - Wire/cable connecting the above elements with each other, providing power supply or connectivity to support facilities shall be:
  - Located inside the pole (if practical)
  - May be above ground if other utilities are above ground
  - Must be below ground if other utilities are below ground
  - Whenever possible, the company shall utilize existing telephone or public utility poles, ducts, conduits, or other facilities for the installation of connecting fiber

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Permitted Visual Appearance of Equipment Housing

- Each equipment housing must be painted with non-reflective paint of the same color as the pole on which it is sited
- If support wiring cannot be installed inside the pole, all wiring must be installed in conduit and must be painted non-reflective paint of the same color as the pole on which it is sited
- No writing, symbol, logo or other graphic representation that is visible from the street or sidewalk shall appear on any exterior surface unless required by law or regulation

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Permitted Weight of Base Station Equipment

- All Equipment to be installed must be a of a weight no greater than that compatible with the capacity of the pole to safely and securely support such equipment
- At the City's request the company shall provide an engineer's report demonstrating that the pole can carry the additional load
- No writing, symbol, logo or other graphic representation that is visible from the street or sidewalk shall appear on any exterior surface unless required by law or regulation

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Permitted Location Requirements

- Each location must be accompanied by documentation to show that there is a need for service in that location
- No more than one Base Station, in total, is permitted on a investor owned utility pole (IOP)
- These regulations only deal with base station locations in the ROW and not on private property or property owned by the City in fee-simple
- Base stations must be at least 500 feet from the nearest base station regardless of owner, absent a needs showing

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Review Requirements for Design and Installation of Base Station Equipment and Antenna

- Installation of equipment and antenna shall be subject to the City's right to review and approve the final design and appearance to ensure:
  - Compliance with all applicable laws, rules and regulations
  - Public safety, integrity of poles and non-interference with pedestrian, bicycle, vehicular traffic, or other modes of transportation
  - Aesthetic consistency with the poles to which the equipment/antenna are attached and to the surrounding context

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Review Requirements for Design and Installation of Base Station Equipment and Antenna

- In addition to the general requirements that installations are subject to City review with all applicable laws, rules and regulations of the City, the following specific approval requirements shall be applicable:
  - Installations in designated historic districts or adjacent to historic landmarks are subject to prior review by the Historic District Commission
  - Installations in environmentally sensitive/protected areas are subject to environmental review

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Review Requirements for Design and Installation of Base Station Equipment and Antenna

- No permit shall be issued with respect to any City, sidewalk or right-of-way where, in the judgement of the City Manager/Designee, sufficient capacity no longer exists for additional facilities to be placed in the proposed location without jeopardizing the
  - physical integrity of the utilities or other facilities already in the proposed location and/or
  - safe use of the street, sidewalk, path, or rights-of-way vehicle, bicycle, or pedestrian

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Power Supply

- Company shall be solely responsible for obtaining and paying all cost for electrical power for its equipment unless they can show in writing the IOP host is providing electricity – this requirement particularly significant where City may have facilities on a property.

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING INVESTOR-OWNED UTILITY POLES (IOP)

Radio Frequency Energy Exposure Limits

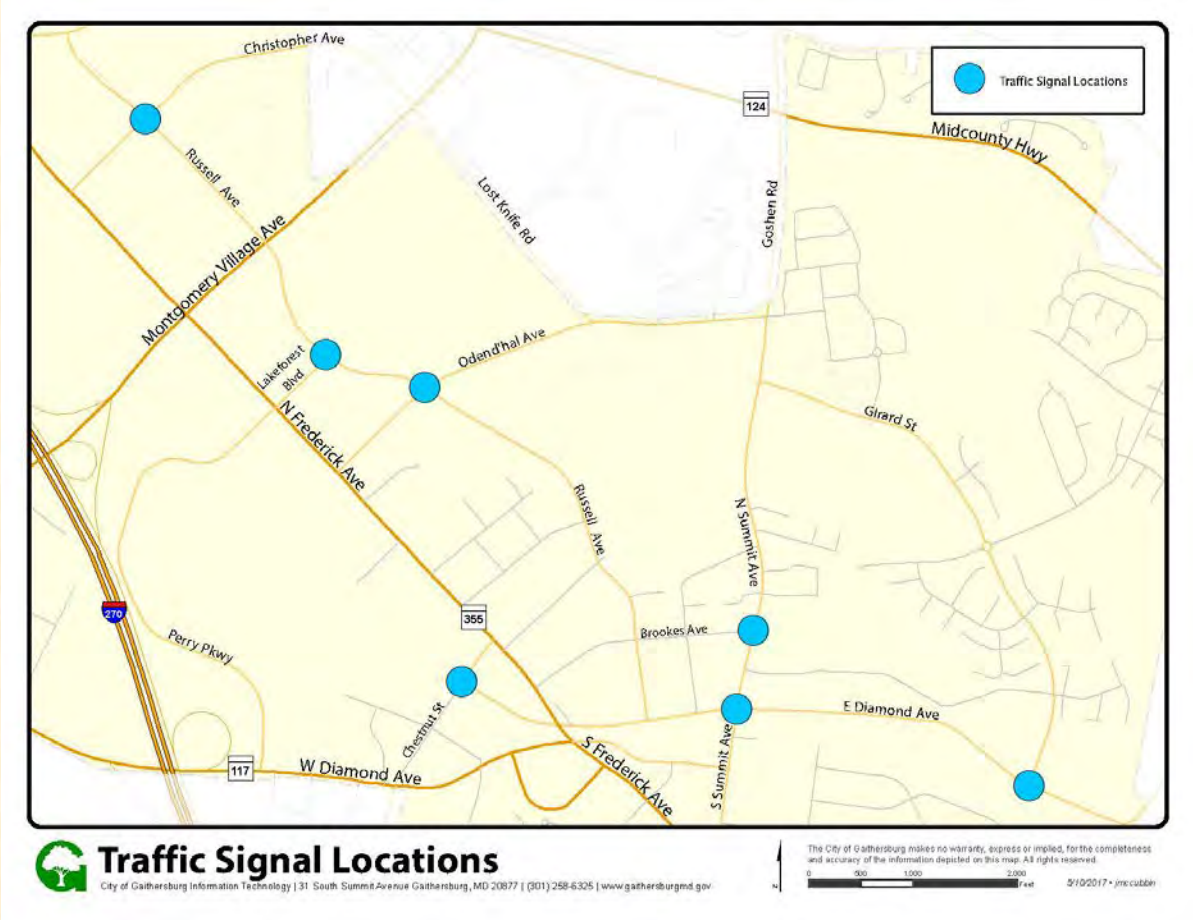
- Company shall comply, on an on-going basis, with the FCC maximum permitted levels of radio frequency energy exposure (taking into account the aggregate of any other radio frequency energy emitter that may be present)
- Company shall comply with all FCC rules and requirements, regarding the protection of health and safety with respect to radio frequency energy exposure, in the operations of the facility – taking into account actual conditions of human proximity
- At the direction of the City, pay the costs of testing such facilities for compliance with the above

DECISION POINT

DOES THE CITY WANT TO ALLOW FACILITIES ON CITY OWNED TRAFFIC SIGNAL AND/OR CITY STREET LIGHT POLES?

- FCC rules do not apply to government acting in a proprietary capacity (as owner of structures)
- City can determine if it wants to allow providers to attach facilities to City owned property and can set the terms
- City would need to enter into a formal Attachment Agreement with each company in addition to the Franchise/ROW Agreement

LOCATIONS OF EXISTING CITY OWNED TRAFFIC SIGNALS



DECISION POINT

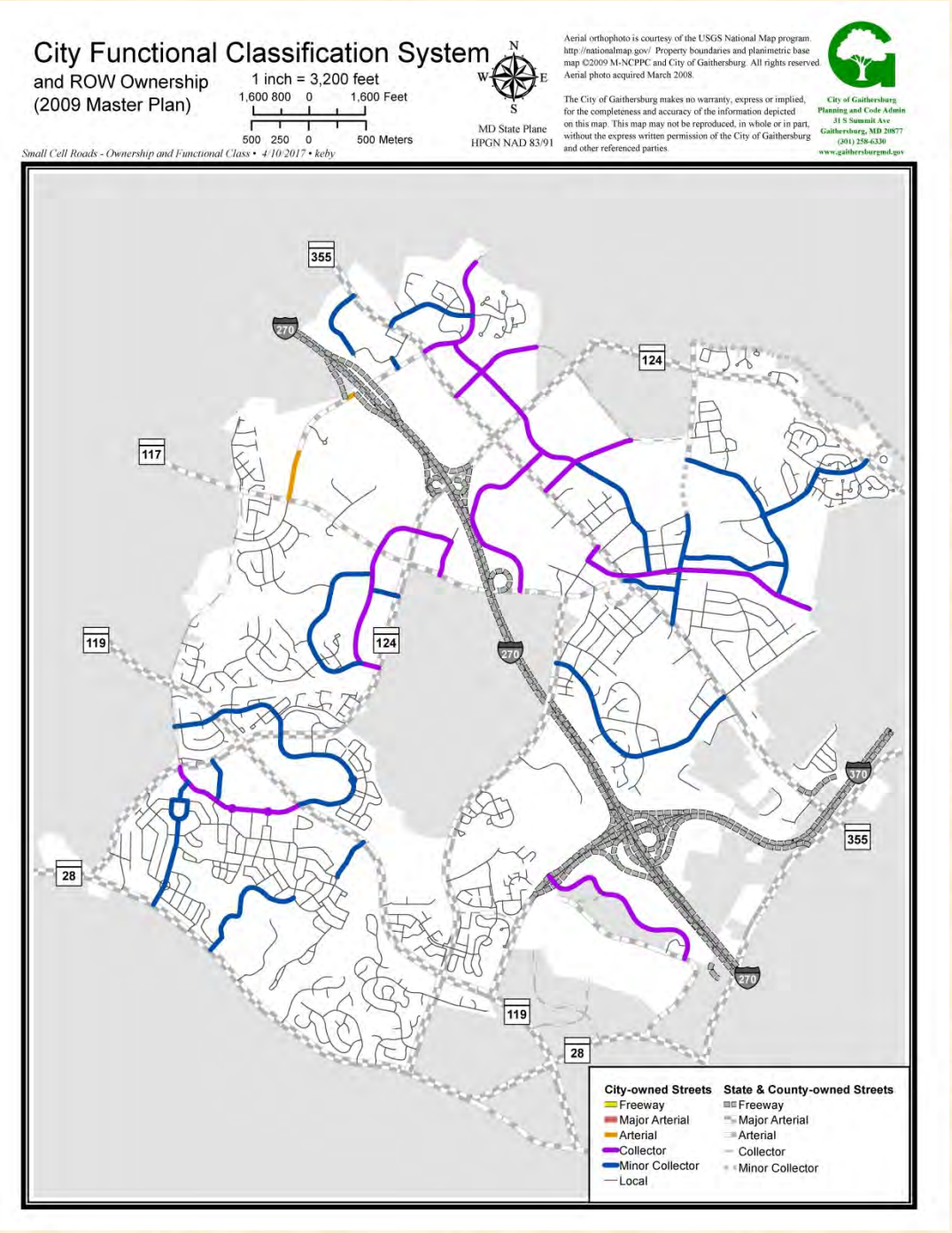
CRITERIA AND DESIGN REGULATIONS OPTIONS EXISTING TRAFFIC SIGNAL AND CITY STREET LIGHT POLE LOCATION(S)

- If the City is acting in its proprietary capacity it could determine the appropriate locations for facilities
- In evaluating appropriate locations many factors can be considered including:
  - Character of the area
  - Height of the existing light poles
  - Engineering and road standards
  - Distance from existing structures, etc.

DECISION POINT

LOCATION(S)

Staff recommends using the City's existing City Functional Street Classification Map



Criteria and Design Regulation Options
Existing City Light Poles

Pole mounted equipment vs ground mounted equipment on existing poles (retrofits)

Staff recommends pole mounted equipment

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Design of Base Station Equipment: Equipment Housings

- Where feasible, incorporate wireless within facilities; otherwise:
- No more than one equipment housing, which may enclose or consist of equipment for one or more cell providers, may be installed on an individual pole
  - Equipment housing shall be no greater than 2.8 cubic feet with maximum dimensions of 13 inches by 9 inches by 4 inches
  - Equipment housing must be mounted on the vertical shaft portion of the pole and be a minimum of 15 feet from the ground and not project over the roadway or pedestrian path/sidewalk

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Design of Base Station Equipment: Antennas

- Omni/Dome Antenna – ***A single omni/dome*** antenna shall be installed in place of two stick-type antennas if it is no greater than 4 feet in height and no wider than 16 inches and it is installed on top of the pole
- ***At the City's request up to 2 stick-type antennas may be*** installed for each base station. Each stick-type antenna shall be no more than 2 inches in diameter and extending no more than 36 inches in length, extending vertically from the base either at the top of the pole or on the related equipment housing. No antenna can be installed in the "bishops crook" or on a horizontal member

Note: Bold and Italic Represent Changes from IOP recommendations

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Design of Base Station Equipment

- Interconnecting Wire/Cable - Wire/Cable connecting the above elements with each other, providing power supply, or connectivity to support facilities:
  - ***Must be located*** inside the pole. ***An exception for the electrical meter may be granted if required by the electrical provider***
  - ***Must be below ground***
  - Whenever possible, the company shall utilize existing telephone or public utility poles, ducts, conduits, or other facilities for the installation of connecting fiber

Note: Bold and Italic Represent Changes from IOP recommendations

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Permitted Visual Appearance of Equipment Housing

- Each equipment housing must be painted with non-reflective paint of the same color as the pole on which it is sited
- ***If the electrical meter cannot be installed in the pole,*** wiring must be installed in conduit and conduit must be painted with non-reflective paint of the same color as the pole on which it is sited
- No writing, symbol, logo or other graphic representation that is visible from the street or sidewalk shall appear on any exterior surface unless required by law or regulation

Note: Bold and Italic Represent Changes from IOP recommendations

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Permitted Weight of Base Station Equipment

- All equipment to be installed must be of a weight no greater than that compatible with the capacity of the pole to safely and securely support such equipment
- ***The placement of the facility must comply with all structural and safety standards. The applicant must provide a structural analysis to show that the existing pole can support existing and any new equipment***
- No writing, symbol, logo or other graphic representation that is visible from the street or sidewalk shall appear on any exterior surface unless required by law or regulation

Note: Bold and Italic Represent Changes from IOP recommendations

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Permitted Location Requirements

- Each location must be accompanied by documentation to show that there is a need for service in that location
- No more than one base station, in total, is permitted on a traffic signal pole (TSP) or street light pole (SLP)
- Base stations installed on TSP/SLP shall be placed, located and operated by the company so as to not illegally interfere with the operation of base stations of other franchisees or other radio frequency spectrum users

Note: Bold and Italic Represent Changes from IOP recommendations

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Permitted Location Requirements

- These regulations only deal with base station locations in the ROW and not on private property or property owned by the City in fee-simple
- Base stations must be at least 500 feet from the nearest base station regardless of owner
- Base station installations on street lights are only permitted on SLPs if such SLPs are located within intersections, except that such base stations may be placed on SLPs located in other locations upon demonstration, and to the satisfaction of the City, that there is an operational need for such placement

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHT POLES

Permitted Location Requirements

- ***Base stations are only permitted on TSP sites within an intersection and only up to the number which leaves two TSPs without base stations***
- ***Base stations are only permitted on SLPs sites within an intersection and only up to the number which leaves two SLPs without base stations***
- ***Traffic signal controller equipment boxes are not available for use for base stations***

Note: Bold and Italic Represent Changes from IOP recommendations

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Review Requirements for Design and Installation of Base Station Equipment and Antenna

- Installation of equipment and antenna shall be subject to the City's right to review and approve the final design and appearance to ensure:
  - Compliance with all applicable laws, rules and regulations
  - Public safety, integrity of poles and non-interference with pedestrian, bicycle, vehicular traffic or other modes of transportation
  - Aesthetic consistency with the poles to which the equipment/antenna are attached and to the surrounding context
  - Restoration of SLP/removal of facilities at agreement end

-60-

Note: Bold and Italic Represent Changes from IOP recommendations

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Power Supply: The company shall be solely responsible for obtaining and paying all cost for electrical power for its equipment. ***The company is allowed to install a separate meter from the traffic light meter.***

Radio Frequency Energy: Company shall comply with FCC maximum permitted levels of RF exposure (accounting for the aggregate of any other RF that may be present)

- Company shall comply with all FCC rules for the protection of health and safety for RF exposure – taking into account actual conditions of human proximity
- At the direction of the City, pay the costs of testing such facilities for compliance with the above
- No interference with City wireless operations

Note: Bold and Italic Represent Changes from IOP recommendations

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Review Requirements for Design and Installation of Base Station Equipment and Antenna

- In addition to the general requirements that installations are subject to City review with all applicable laws, rules and regulations of the City, the following specific approval requirements shall be applicable:
  - Installations in designated historic districts or adjacent to historic landmarks are subject to prior review by the Historic District Commission

Note: Bold and Italic Represent Changes from IOP recommendations

RECOMMENDED CRITERIA & DESIGN REGULATIONS EXISTING CITY OWNED TRAFFIC SIGNALS AND/OR STREET LIGHTS

Review Requirements for Design and Installation of Base Station Equipment and Antenna

- No permit shall be issued with respect to any City, sidewalk or right-of-way where, in the judgement of the City Manager/Designee, sufficient capacity no longer exists for additional facilities to be placed in the proposed location without jeopardizing the
  - physical integrity of the utilities or other facilities already in the proposed location and/or
  - safe use of the street, sidewalk, path, or rights-of-way by vehicle, bicycle, or pedestrian

Note: Bold and Italic Represent Changes from IOP recommendations

FINDINGS BY CITY MANAGER/DESIGNEE WHEN REVIEWING ALL APPLICATIONS

- Applicant complies with all requirements in the regulations
- Location selected in the application is not in an area where there is an over concentration of poles or other facilities in or over the streets, sidewalks, or other rights-of-way
- Location selected and the scale and appearance of the wireless facilities and support structures to be installed are consistent with the general character of the neighborhood
- Applicant has agreed to and provided adequate insurance, bonding and indemnification
- Applicant has entered into a Franchise/Right-of-Way Use Agreement and Attachment/Replacement Pole Agreement (if applicable)
- Wireless facilities do not generate noise above 55 dB if located in a residential area

DECISION POINT

Does the City allow for replacement of existing City traffic signal and/or light poles?

CONSIDERATIONS REGARDING ALLOWING REPLACEMENT OF EXISTING CITY LIGHT POLES

- Should there be a structural issue with the attachment of small cell facilities on City owned poles, staff recommends the Mayor and Council consider the option of a replacement light pole
- Because the Company cannot currently install new poles, it is important to note that this is not a new pole but a replacement pole, and the City would contract with the applicant for installation, but pole would remain, or become property of City
- Pole would require to serve as both street light and small cell facility

CONSIDERATIONS REGARDING ALLOWING REPLACEMENT OF EXISTING CITY LIGHT POLES

- The City shall contract with the company to replace the existing light pole to the agreed upon specifications. The company shall pay all related costs
- Company shall be responsible for all maintenance costs in case of damage or repair. In addition, company agrees to pay electric for associated street light
- Company must remove and replace the facility with a light pole of the same design as those adjacent to it should the wireless facility become obsolete
- Shall comply with such other requirements and conditions as the City Manager/Designee may conclude are appropriate to impose

ALLOCATION OF POLE SITES AMONG STREET POLE FRANCHISEES

In managing the Rights-of-Way/other assets we have to balance the following items:

- Requests from multiple companies
- Ensuring that the City is complying with the Federal requirement that the City may not “unreasonably discriminate” among companies of functionally equivalent services, if applicable
- Ensuring that approvals don’t create a negative impact on physical integrity of existing public and utility infrastructure

RESERVATION PROGRAM

- At least once a year, the City would allow companies to place a specific number of street poles under “reservation” during a reservation phase
- This would allow companies to decide where to place their emphasis while allowing opportunity for all franchisees
- Company would have an option (for specific period of time - possible one to two years) to apply for use of “reserved” pole as a base station. If “reserved” pole not used within specified time, it would be placed back into pool for reallocation during next reservation phase

RESERVATION PROGRAM (CON'T.)

- The number of poles in a reservation phase would be determined by the number of eligible locations and the City's ability to monitor the installation process
- In cases where two or more franchisees request the same location, the City could develop a priority system based on franchisees' requests which take into account an RFP process prior to the initiation of the first reservation phase
- To limit requests for the same location, the City could allow transfer of street pole reservations among the various franchisees

NOTIFICATION RECOMMENDATIONS

- The City would publish, annually, on its website the pole reservations for each company
- Companies would be required to send written notification directly to an adjacent property owner upon securing the pole reservation and 30 days prior to submittal of permit request

REPORTING AND INFORMATION REQUIREMENTS

- Status Report: On an annual basis, company shall provide report on installations for the previous 12 months and anticipated plans for the coming 12 months
- Completion Report: 10 days after base station completion, the Company must notify the City
- Additional Information: Upon request, company shall respond to request for information related to the Franchise/ROW Agreement, Regulations or other agreements

FEES FOR ATTACHMENT AND POLE ATTACHMENT AND REPLACEMENT

- Staff recommends a monthly fee for each type
- A fee should be applied to reserved poles and actual base station poles. This fee could be different or the same
- One requires more coordination so there could be an additional contract coordination fee (suggested 10%) in the case of the initial costs associated with a pole replacement project

POTENTIAL CITY CODE AMENDMENTS
FOR DISCUSSION AND COMMENT
MAYOR AND COUNCIL WORK SESSION
MAY 22, 2017

CHAPTER 19 - STREETS AND SIDEWALKS

ARTICLEII. - ROAD CONSTRUCTION

Sec. 19-7. – Definitions.

For purposes of this article, the following words and phrases shall have the meanings respectively ascribed to them by this section:

* * * *

*Public easement.*A recorded right of use over private or public property which shall include rights of way and other uses to which the city is a party, and shall also include public utility easements, including those to telephone, electric, gas, and water and sewer providers.

*Public facility.*Systems, functions, projects or equipment supporting the health and well-being of city residents and businesses, including city functions and those of public utilities, including telephone, electric, gas, and water and sewer providers.

* * * *

Sec. 19-9A. - Permits for placement of ~~private~~ facilitiesor utilities, whether private or public, in roads and public rights-of-way; required.

(a) It shall be unlawful for any person to obstruct, grade, dig, excavate or construct, within or under any public road or other public right-of-way or public easement, without first obtaining a permit ~~therefor~~ from the city.

(b) It shall be unlawful for any person to install, repair or maintain, within or under any public road, right-of-way or public easement, any privately owned facility, structure, fixture, equipment, conduit, cable or pipe without first obtaining a permit ~~therefor~~ from the city.

(c) Permits approved under this section shall,as specified in section 20-62(j) of this Code,be subject to such rights as the City possesses with respect to those rights of way and applicable requirements set forth in Right-of-Way standardsadopted by regulation pursuant to section 2-10 of this Code, and shall be installed, where approved,in a manner that minimizes risks to public safety, avoids placement of aboveground facilities in underground areas, and otherwise maintains the integrity and character of the neighborhoods in which the facilities are located; and ensures

that installations are subject to periodic review to minimize the intrusion on the rights of way,andmay, in the discretion of the city manager or ~~his~~ designee:

(1) Be subject to such conditions as are necessary to protect the public health, safety and welfare; and

(2) Be subject to the permittee posting with the city such bonds or other financial security to insure the completion, safety, workmanship and restoration of the work and/or work area so permitted; and

(3) Be subject to relocation at the expense of the permittee in the event that the privately owned facility is found to conflict with future public facilities or with access to repair, replace or maintain existing or future public facilities; ~~and~~

(4) Be subject to the execution by permittee of written agreements of insurance and indemnification as are reasonably necessary to protect the interests of the city~~.~~; and

(5) Be subject to the permittee obtaining all required consents, licenses or franchises from the city with respect to the facilities that are the subject of the permit.

CHAPTER 20 – SUBDIVISION OF LAND

ARTICLE VIII – STREET PROFILES AND GRADE ESTABLISHMENTS

Sec. 20-62 – Required public improvements.

The following public improvements shall be required.

(a) *Construction of new roads, sidewalks, etc.* The roads, streets, alleys, sidewalks, and pedestrian and bicycle paths with appurtenant drainage, street trees, and other integral facilities in each new subdivision must be constructed in accordance with the approved subdivision and site plan by the subdivider or developer under the specifications of the city road construction code, or the requirements of the applicable governmental jurisdiction, whichever is applicable. Sidewalks should be connected.

* * * *

(j) *Facilities or utilities in public rights-of-way.* All construction of facilities or utilities, whether public or private, are subject to section 19-9A of this Code and shall meet the applicable requirements set forth in Right-of-Way standards adopted by regulation pursuant to section 2-10 of this Code.

CHAPTER 24 – ZONING

ARTICLE 1. – IN GENERAL

Sec. 24-1. – Definitions

For the purposes of this chapter, the following words and phrases shall have the meanings respectively ascribed to them by this section:

* * * *

Public property. Any property owned by the City, not including a public right-of-way.

* * * *

Reception antenna. A device designed for end-user over-the-air reception, not transmission of multi-channel multi-point distribution service, or direct broadcast satellite service; or for end user reception of signals from an Internet service provider and end user transmission of signals to an Internet service provider; and antennas permitted by right under Federal Communications Commission regulations, including 47 C.F.R. § 1.4000.

* * * *

Right-of-way. As defined in Section 20-4 of this Code, a strip of land intended to be occupied by a street, alley, sidewalk, pedestrian and bicycle path, crosswalk, railroad, road, electric transmission line, oil or gas pipeline, water main, sanitary or storm sewer herein. The usage of the term "right-of-way" for land platting purposes shall mean that every right-of-way hereafter established and shown on a final plat is to be separate and distinct from the lots or parcel adjoining such right-of-way and not included in the area within the dimensions or areas of such lots or parcels. Rights-of-way intended for streets, crosswalks, sidewalks, pedestrian and bicycle paths, water mains, sanitary sewers, storm drains, or any other use involving maintenance by a public agency shall be dedicated to public use by the maker of the plat on which such right-of-way is established. A right-of-way as defined by the Washington Suburban and Sanitary Commission may be included in this definition as a part of a lot or parcel.

* * * *

Telecommunications facility. Any exterior facility, and any interior facility whose installation requires a modification to the exterior dimensions or appearance of the telecommunications facility support structure within which it is placed**,** including an antenna, antenna array or other communications equipment, excluding a satellite dish antenna~~or small cell telecommunications facility~~, established for the purpose of providing wireless voice, data and image transmission within a designated service area and which includes equipment at a fixed location used in the

provision~~consisting~~ of personal wireless services, as defined in Federal law, including by Federal Communications Commission orders or regulations. A telecommunications facility must not be staffed. A telecommunications facility consists of one or more antennas at a fixed locationattached to a support structure and related equipmentat that location, including but not limited to radio units, cabling, and power supplies. A telecommunications facility, once installed, includes the telecommunications facility support structure to which it is attached; in the case of a building, the telecommunications facility support structure includes only that portion of the building to which attachment is permitted**.**Equipment may be located within a building or an exterior equipment cabinet.

*Telecommunications facility, co-location.*Siting additional telecommunications facilities on an exterior structure or pole with an existing telecommunications facility, using the same base or support structure, without the need to construct a new base structure. Co-location may include siting multiple facilities from the same provider or from more than one provider in the same location.

*Telecommunications facility, major modification.*An alteration of an existing ~~exterior~~ telecommunications facility for any purpose which substantially changes the physical dimensions of the facility, where (i) the height of the existing facility is increased by more than ten (10) percent from the current height, or twenty (20) feet, whichever is greater; (ii) the modification will require an additional protrusion of more than twenty (20) feet or width of the existing tower, whichever is greater; (iii) the modification would require the installation of more than the standard number of equipment boxes for the technology involved, not to exceed four (4) cabinets overall; (iv) the modification would entail any excavation or installation outside existing leased or owned property and current easements or outside the current site of the facility; or (v) the modification would defeat or detract from the existing concealment or stealth elements of the facility. The calculation for such modifications shall be cumulative over time following the initial approval of the telecommunications facility.

*Telecommunications facility, minor modification.*An alteration of an existing ~~exterior~~ telecommunications facility or co-location of additional facilities with an existing ~~exterior~~ telecommunications facility in any zone that does not meet or exceed the thresholds for a major modification, the calculation for which shall be cumulative over time, following the initial approval of the telecommunications facility.

*Telecommunications facility, new.*The establishment of a telecommunications facility on a base structure where no such facility presently exists; or the construction of a monopole, tower or the replacement of an existing telecommunications facility support structure to support a telecommunications facility.

~~*Telecommuications facility, small cell.*An exterior facility, excluding a satellite dish antenna, established for the purpose of providing wireless voice, date and/or image transmission within a designed service area. A small cell telecommunications facility must not be staffed, and consists of one or more antennas attached to a support structure. Antennas may not be larger than a maximum height of four (4) feet and a maximum width of two (2) feet six (6) inches.~~

Telecommunications facility, stealth. Any telecommunications facility that is integrated into an architectural feature of a structure or the landscape so that the facility and its purpose to provide wireless services is not visually apparent or prominent.

Telecommunications facility, support structure. A monopole, tower, utility pole, existing light pole, building or any other freestanding self-supporting structure or replacement~~of equivalent dimensions~~ which can safely support the installation of a telecommunications facility.

* * * *

Tower. A ~~freestanding lattice-type structure, supporting antennas used for radio, television broadcasting, or wireless transmission or reception.~~tower has the same meaning as the term as used in Federal Communications Commission regulations, including 47 C.F.R. § 1.40001, and consists of any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site,except that it does not include monopoles.

ARTICLE IV. - SUPPLEMENTARY ZONE REGULATIONS

Sec. 24-167A. - Satellite antennas and towers, poles, antennas and/or other structures intended for use in connection with transmission or receipt of radio or television signals, telecommunications facilities ~~or small cell telecommunications facilities~~.

(a) No satellite antennas, as hereinafter defined, shall be erected, constructed, maintained or operated except in conformance with the following regulations:

(1) Satellite antennas are defined for the purposes of these regulations as any device greater than one meter in diameter used or designed for receiving radio or electromagnetic signals from one or more orbitally based satellites and are external to or are attached to the exterior of any building.

(2) Within any single-family detached or attached residential use or zone, residential buffer zone, or commercial buffer zone:

(i) Such antenna shall be located only in the rear yard of any lot or upon a building on said lot. If a usable satellite signal cannot be obtained in a rear yard, due to obstruction of the antenna's reception window, then the antenna may be located in any side yard of the property. All installations shall be located to prevent obstruction of the antenna's reception window from potential permitted development on adjoining property;

(ii) No portion of the structure shall be located within any minimum required yard setback or closer to any property line, or electric power line, than the height of such structure;

(ii) Not more than one satellite antenna shall be installed on any lot less than one acre in size;

(iv) All satellite antenna installations shall employ (to the extent possible) materials and colors that blend with the surroundings;

(v) No satellite dish antenna shall exceed four (4) meters;

(vi) Allnonroof-mounted satellite antenna installations, including wires, supporting structures and accessory equipment, shall be screened by architectural or landscape treatments along the antenna's nonreception window axis and low-level landscape treatment along the reception window axis of the antenna base. Screening shall be of a height and nature so as to provide minimum opacity from the ground level, yet not interfere with signal reception.

(vii) A roof-mounted satellite antenna shall not exceed twelve (12) feet in height, measured from the lowest point at which the antenna is attached to the building.

(3) Within any multifamily residential use or zone containing multifamily residential structures, the provisions of subsection (a)(2) above shall apply, except that one satellite antenna may be permitted for each building.

(4) Within any commercial, employment or industrial zone:

(i) Such antenna may be located anywhere upon the lot or buildings thereon, but may not be located within any yard setback area or cross the vertical plane of the property line;

(ii) All ground-mounted installations shall comply with subsections (a)(2)(iv) and (vi);

(iii) No rooftop satellite antenna installation shall exceed eleven (11) meters in diameter.

(iv) More than one satellite antenna may be located upon a lot, tract or parcel, subject to the following requirements:

a. The antennas shall be part of an ancillary or accessory use associated with buildings and uses contained within an office or industrial park; and

b. The antennas shall be located within the same subdivision as the office or industrial park or on land abutting or confronting said subdivision; and

c. All antennas shall be either individually or collectively fenced for security purposes and screened to minimize visual impact on surrounding properties and from the public street.

(5) All such antennas shall be located and designed so as to minimize visual impact on surrounding properties and from public streets.

(6) All antennas and the construction and erection thereof shall conform to applicable city building code and electrical code regulations and requirements. A building permit shall be required for the location, relocation, erection and installation of any satellite television antenna.

(7) All antennas shall meet all manufacturers' specifications, be of noncombustible and corrosive resistant material, and be erected in a secure, wind-resistant manner. Every antenna shall be adequately grounded for protection against a direct strike of lightning.

(8) These regulations shall apply to and be enforceable against the owner of any such satellite television antenna, the owner or tenant of any property upon which such antenna is located, and any contractor, business or individual installing a satellite antenna.

(b) Reception antennas~~Towers, poles, antennas or other structures intended for use in connection with transmission or receipt of radio or television signals or both, other than satellite antennas; provided, that they are not used in connection with the operation of a commercial radio or television broadcasting station,~~ are permitted subject to the requirements set forth in this subsection. Such structures may be freestanding or fastened to a building. No portion of any such structure shall be erected within any minimum required yard or closer to any property line in a residential zone, or to any electric power line serving a lot other than the lot on which such structure is located, than the height of such structure. The height of any such structure shall be measured from the lowest point at which such structure touches the ground; provided, that if such structure is attached to a building and does not touch the ground, its height shall be measured from the lowest point at which such structure is attached to the building. This paragraph shall not be construed to prevent the construction of such a structure on the

roof of any building; provided, that the height of such structure does not exceed twenty (20) feet. Such structures are not approved by the City, and shall not be used for co-located telecommunications facilities~~.or small cell telecommunications facilities.~~ Any reception~~tower, pole, antenna or other structure referred to in the first sentence of this paragraph which~~antenna which was lawfully erected prior to November 7, 1974, shall, notwithstanding anything to the contrary herein, continue to be deemed lawful. The following subsections applicable to satellite antennas shall also apply to towers, poles, antennas or similar structures generally: subsection (a)(2)(iv) and (vi), and subsection (a)(3), (4), (5), (6), (7), and (8).

(c) The city council~~,~~ is authorized to hear and decide conditional use permits for towers, ~~poles,~~antennas, buildings or other structures intended for use in connection with the operation of a commercial radio or television broadcasting station in the C-2 Zone, as set forth in section 24-10 and may approve this use upon the following affirmative findings:

(1) The proposed structure will not endanger the health and safety of residents, employees or travelers, including, but not limited to, the likelihood of the failure of such structures.

(2) The proposed structure will not substantially impair the use of, or prove detrimental to, neighboring properties, considering, among other relevant factors, the following:

(i) The topography and elevation of the property on which such structure is proposed to be located and the appearance and visibility of such structure from neighboring and surrounding properties and from public rights-of-way;

(ii) The location of surrounding residences, buildings, structures and public rights-of-way and their use;

(iii) The character of the surrounding neighborhood and the master plan recommendations for the ultimate use of surrounding properties;

(iv) The likelihood or interference with existing radio, television, telephone or microwave reception or service.

(3) The proposed structure will cause no objectionable noise, fumes, odors, glare, physical activity or effect that would impair the peaceful enjoyment of neighboring properties;

(4) The proposed buildings, structures and use will be in harmony with the general character of the neighborhood;

(5) The proposed structure will be served by adequate public services and facilities, including police and fire protection, water and sanitary sewer, storm drainage, public roads and other public improvements.

(d) Telecommunications facilities.

(1) Standards when allowed as permitted use. The following standards apply in those zones in which new telecommunications facilities or major modifications of telecommunications facilities are allowed as a permitted use, where the telecommunications facilities do not satisfy the standards in subsection (e).

(i) ~~An antenna and a related unmanned equipment building or cabinets~~telecommunications facility may be installed on a rooftop of a building and on privately owned land which is at least thirty (30) feet in height. An antenna or any related equipmentmay be mounted on the wall of a building at a height of at least thirty (30) feet. A telecommunications facility antenna must not be mounted on the facade of any building designed or used as a one family residential dwelling. Other equipment and structures associated with the telecommunications facility (other than cabling and the equipment required to attach the antenna, and any concealment elements associated with the antenna or cabling)~~An unmanned equ8ipment building or cabinet~~may be located on the roof of a building provided it and all other roof structures do not occupy more than twenty-five (25) percent of the roof area**.** If such other equipment and structures, considering any existing telecommunications facilities at the site,~~Unmanned equipment buildings or cabinets that~~ increase the roof coverage of all roof structures to occupy more than twenty-five (25) percent of the roof area may be approved by the board of appeals as a special exception in accordance with subsection (d)(2).

(ii) Telecommunications antennas may be attached to a free standing monopole or toweron privately owned land. A free-standing monopole including antenna structure for a telecommunications facility is permitted up to one hundred seventy nine (179) feet in height with a setback of one foot for every foot of height from all adjoining residentially zoned properties, and a setback of one-half (½) foot for every foot of height from adjoining non-residential properties. Towers are only permitted by special exception when approved by the board of appeals under subsection (d)(2) unless the tower is a stealth telecommunications facility. A monopole **or** tower mounted on a rooftop of a building is not permitted, unless it is designed as a stealth telecommunications facility.

(iii) Antennas are limited to the following types and dimensions: omni-~~dimensional~~directional (whip) antennas not exceeding fifteen (15) feet in height and three (3) inches in diameter; directional or panel antennas not exceeding eight (8) feet in height and two (2) feet in width. Antennas not meeting these criteria may be permitted by special exception when approved by the board of appeals under subsection (d)(2).

(iv) An unmanned equipment building or cabinet included as part of a telecommunications facility on privately owned land must not exceed five hundred sixty (560) square feet and twelve (12) feet in height. Any such equipment building or cabinet must be so located as to conform to the applicable set back standards of the zone in which the property is classified.

(v) Public property.

a. A private telecommunications facility and/or a support structure telecommunications facilitymay be located on public property or

attached to an existing structure owned or operated by the city ~~or within city right-of-way~~ and shall be a permitted use on such public property or structurein all zones. The use of any public property or structureowned or operated by the city shall be at the discretion of the city council and shall not be subject to the same conditions and requirements as are applicable to such facilities on privately owned property.

b. A private telecommunications facility and/or a new support structure telecommunications facility which is not a monopole or tower may be located within a city right of way by utilities that (i) hold an applicable City franchise or license to use the rights of way and (ii) have paid all applicable fees, and shall,as specified in sections 19-9A(c) and 20-62(j) of this Code, be subject to applicable requirements, approval and appeal procedures set forth in Right-of-Way standards adopted by regulation pursuant to section 2-10 of this Code. The city council may but is not required to hold a public hearing or meetingprior to its decision to allow the use of property owned or under the control of the city**,** including public right-of-ways.

~~b~~.**c.** A ~~private~~ telecommunications facility may be located on ~~public~~ property or rights of wayof or attached to an existing structure owned or operated by a county, state, federal or other non-city governmental agency or on the property of an independent fire department or rescue squad subject to the same conditions and requirements as are applicable to such facilities on privately owned property.

(vi) All such ~~antennas~~telecommunications facilities and new support structures shall be located and designed so as to minimize visual impact on surrounding properties and from public streets.

(vii) No signs are permitted in connection with any telecommunications facility, except as required by law.

(viii) No lights are permitted on any tower**,** monopole or antenna, except as required by law.

(ix) Where otherwise consistent with subsection vi, and applicable height limits**,** all towers and monopoles erected as part of a telecommunications facility which are not stealth telecommunications facilitiesmust maintain at least three (3) telecommunications carriers.

(x) Except for approved stealth towers, ~~N~~no more than one ground-mounted tower or monopole is permitted on a lot or parcel of land and, no two (2) ground-mounted towers or monopoles may be located within one thousand (1,000) feet of each other in any zone in which such facilities are permitted uses. In any such zone, more than one ground-mounted tower or monopole may be permitted on a lot or parcel and two (2) or more monopoles may be located within one thousand (1,000) feet of each other by special exception approved by the board of appeals. A special exception to permit either the location of more than *one ground-mounted tower or*monopole on a lot or parcel or two (2) or more *ground-mounted towers or*monopoles within one thousand (1,000) feet of each other may only be approved by the board of appeals if the applicant establishes that existing telecommunications facilities serving the same service area have no additional capacity to include the applicant's antenna or that co-location on an existing *tower or* monopole is technically impractical and that engineering criteria establish the need for the requested facility. In addition, any such application must comply with all of the other standards and requirements applicable to special exceptions for telecommunications facilities.

(xi) Every telecommunications facility and any support structure used by that telecommunications facility ~~free standing monopole or support structure and any unmanned equipment building or cabinet associated with a telecommunications facility~~ must be removed at the cost of owner of the facility when the telecommunications facility is no longer in use by any telecommunication carrier; and all affected property must be restored its prior condition, or to such other condition as may be required by applicable regulations.

(2) Standards and requirements applicable to special exceptions for new or major modifications to telecommunications facilities.

(i) An application for a special exception for a new or major modification to a telecommunications facility may be approved by the board of appeals if the board finds that:

a. Complies with all of the standards contained in subsection (d)(1).

b. The location selected is necessary for the public convenience and service.

c. The location selected is not in an area in which there is an over concentration of freestanding monopoles, towers or similar structures.

d. The location selected for a tower or monopole is more than three hundred (300) feet from either the nearest boundary of a historic district or more than three hundred (300) feet from the nearest boundary of the environmental setting of a historic resource that is not within a historic district.

e. The location selected for a tower ormonopole is suitable for the co-location of at least three (3) telecommunication antennas and related unmanned cabinets or equipment buildings and the facility is designed to accommodate at least three (3) antennas. The holder of a special exception may not refuse to permit the co-location of two (2) additional antennas and related equipment buildings or cabinets unless co-location is technically impractical because of engineering and because it will interfere with existing service. The refusal to allow such co-location without just cause may result in revocation of the special exception.

f. In the event a telecommunications facility is proposed to be located on a rooftop or structure, the board of appeals must find that the building is at least thirty (30) feet in height on any multifamily residential or non-residential building. Rooftop telecommunications facilities may not be located on a one family residenceunless they are stealth telecommunications facilities**.**

g. In the event a telecommunications antenna is proposed to be located on the facade of a building, the board of appeals must find that it is to be located at a height at least thirty (30) feet on a multifamily residential or non-residential building. A telecommunications antenna must not be mounted on the facade of a one family residence.

h. In any residential zone the board of appeals must find that the equipment building or cabinet does not exceed five hundred sixty (560) square feet and twelve (12) feet in height, and is faced with brick or other suitable material on all sides and that the facades are compatible with the other building or buildings located on the lot or parcel. Equipment buildings and cabinets must be landscaped to provide a screen of at least three (3) feet. The board may require that towers or monopoles:

   1. Be camouflaged;

   2. Be placed within a part of an existing structure; or

   3. Be constructed in such a way that the **tower or** monopole appears to be part of an existing structure.

i. The board must further find that any equipment building or cabinet is located in conformity to the applicable set back standards of the zone.

j. The board must find that the addition of an equipment building or cabinet proposed to be located on the roof of a building, in combination with all other roof structures does not create the appearance of an additional story and does not increase the roof coverage by more than an additional ten (10) percent. The board must also find that the structure is not visually intrusive.

~~k. The board must also find that a free-standing monopole or other support structure is proposed to hold no less than three (3) telecommunications carriers. The board may approve a monopole or other support structure with fewer than three (3) telecommunications carriers if the applicant establishes that: (a) existing telecommunications facilities serving the same service area have no additional capacity to include the applicant's antenna; or (b) the applicant establishes that co-location on an existing monopole is technically~~

~~impractical and that engineering criteria establish the need for the requested facility; and the approval of the application will not result in an over concentration of similar facilities in the surrounding area.~~

k~~l~~. The board of appeals may, upon request of the applicant, waive the dimensional restrictions of an antenna, equipment cabinet or support structure provided the board makes the additional finding that the increased size is integrated into the structure and limits the visual impact to the maximum extent possible.

(ii) Area requirements.

a. The minimum parcel or lot area is sufficient to accommodate the location requirements for the tower,monopole or other support structure as hereinafter set forth in subsection (d)(2)(iii).

b. In no event may the minimum parcel or lot area be less than the lot area required for the zone in which the monopole or support structure is located.

c. For the purpose of this section, the location requirement is measured from the base of the monopole or other support structure to the perimeter property line.

d. The board of appeals may, upon request of the applicant, reduce the location requirement to not less than the building setback for the applicable zone, provided the board makes the additional finding that the reduced location requirement results in a less visually obtrusive location for the monopole or other support structure. In making that additional finding, the board shall consider the height of the structure, topography, existing vegetation, planned landscaping, the impact on adjoining and nearby residential properties, if any, and the visibility of the monopole or other support structure from adjacent streets.

(iii) Location requirements for structures. ~~Outside of the rights-of-way a~~Amonopole or ~~other support structure~~ tower must be located as follows:

a. In residential zones, a distance of one foot from the property line for every foot of height of the monopole or~~other support structure~~tower.

b. In non-residential zones, monopoles and~~other support structures~~ towers must be located at a distance of one-half (½) foot from the property line of adjacent non-residentially zoned property for every foot of height of the monopole or~~other support structure~~tower. Such structures must be located a distance of one foot from the property line of adjacent residentially zoned property for every foot of height of such structure.

(iv) Signage. No signs are permitted in connection with the establishment of a telecommunications facility, except as required by law.

(v) Lights. No lights or other illumination devices are permitted on a monopole or other support structure, except as required by law.

(vi) Removal of telecommunications facilities. The requirements of subsection (1)(xi) must be satisfied.~~Every free-standing monopole or support structure and any~~

~~unmanned equipment building or cabinet associated with a telecommunications facility must be removed at the cost of owner of the facility when the telecommunications facility is no longer in use by any telecommunication carrier.~~

Due to the extensive and prolonged review by regulatory agencies of applications for licenses to operate commercial radio or television broadcasting stations, the establishment of such use may be initiated for up to five (5) years from the date of the decision of the city council, or from the date of a final decision of any appeal filed therefrom. Appeals may be filed to any decision of the city council under this subsection (c) in the same manner as provided generally from appeals to decisions of the board of appeals under section 24-193.

(3) Minor modifications of existing telecommunications facilities, whether permitted by right or by special exception, in any zone may be granted by staff in compliance with section 24-172A(b).

(e) **Special rules**~~small cell telecommunciations facilities~~. ~~The following standards apply I~~ in those zones where ~~small cell~~ telecommunications facilities meeting the standards of this subsection (e) are a permitted use, a telecommunications facility satisfying the following requirements may be granted by staff, subject to appeal to the City, provided that the telecommunications facility and associated support structure are subject to such concealment elements that the facility may not be expanded beyond the size limits specified in any permit without the approval of the City:

(1) Antennasmay not be larger than a maximum height of four (4) feet and a maximum width of two (2) feet, six (6) inches and all antennas on the structure, including any pre-existing antennas on the structure, must in aggregate fit within enclosures (or if the antennas are exposed, within imaginary enclosures, i.e., ones that would be the correct size to contain the equipment) that total no more than six cubic feet in volume, with an unmanned equipment building or cabinet included as part of a telecommunications facility must not exceed two hundred (200) square feet and five (5) feet in height. Any such equipment building or cabinet must be so located as to conform to the applicable set back standards of the zone in which the property is classified.

(2) Within a right-of-way, the telecommunications facility, and any modifications to the supporting structure may not be larger than the dimensions specified in applicable requirements set forth in Right-of Way standards adopted by regulation pursuant to section 2-10 of this Code.

(3) The telecommunications facility shall be placed on an existing supporting structure.

(~~1~~4) A ~~small cell antenna~~ telecommunications facility may be installed on a support structure on privately held land under the following conditions:

(i) At a height of at least twenty (20) feet on an existing multifamily residential building in any zone.

(ii) At a height of at least fifteen (15) feet on an existing non-residential or mixed use structure in any zone.

(iii) There will be no hazardous materials at the site.

(5) Equipment associated with the telecommunications facility on privately held land~~Unstaffed equipment that is accessory to antennas~~ may **be ground mounted or** located on a support structure, within a building, within an equipment cabinet outside a building, or on a rooftop.

(i) Ground equipment shall have a maximum footprint of twenty (20) square feet with a maximum height of four (4) feet and must be so located and installed a minimum of three (3) feet from any property line.

(ii) Rooftop equipment may be installed on privately owned land under the following conditions:

a. At a height of at least twenty (20) feet on an existing multifamily residential building in any zone.

b. At a height of at least fifteen (15) feet on an existing non-residential or mixed use structure in any zone.

c. Equipment cabinets shall have a maximum footprint of thirty six (36) square feet with a maximum height of five (5) feet, in combination with all other roof structures may not occupy more than twenty-five (25) percent of the roof area, and must be screened in accordance with the building code.

(iii) Equipment may be installed on a support structure on privately owned land under the following conditions:

a. At a height of at least twenty (20) feet on an existing multifamily residential building in any zone.

b. At a height of at least fifteen (15) feet on an existing non-residential or mixed use structure in any zone.

c. Equipment cabinets shall have a maximum size of twenty (20) cubic feet with a maximum height of four (4) feet.

(iv) In residential zones small cell facilities shall be integrated into the architecture of the structure on which it is placed.

(6**)** An installation of a ~~small cell~~ telecommunications facility that does not increase the size or height of the support structures, excluding antennas, by more than twenty (20) percent is permitted on privately-held land provided the expansion does not create a public health or safety concern.

(**47**) A ~~small cell~~ telecommunicationsfacility that increases the size or height of the support structure by more than twenty (20) percent on privately held land is approvable by the planning commission under the following conditions:

(i) The applicant shall provide, by mail or personal delivery, written notice in a form approved by the city planning department to owners of property abutting and confronting the property that is the subject of the request within two (2) business days of filing the request and shall certify the same to the planning department.

(ii) The applicant shall demonstrate that the expansion of the support structure is integrated into the surrounding area and limits the visual impact to the maximum extent possible.

(iii) The expansion of the support structure does not create a public health or safety concern.

(~~5~~8) On privately held land,~~A~~a small cell facility must not be installed on or within thirty (30) feet of a single-family detached or attached dwelling unit or any accessory structures to these units.

(~~6~~9) The applicant shall provide proof that the proposed telecommunications facility will be used to provide~~it is a licensed providers or public utility~~ personal wireless services, and that the entities that will own the telecommunications facilities are utilities authorized to occupy the properties that will be used, and will comply with all applicable federal, state and city laws and regulations~~, including those regarding wireless communications services~~.

(~~7~~10) For privately-held land, T~~t~~he applicant shall provide certification of property owner approval; for public property and rights of way, applicant shall provide proof of authority to use and occupy the rights of way or other public property.

(~~8~~11) Telecommunications facilities must be installed as stealth telecommunications facilities on properties (i) within a historic district or (ii) that have been designated by the city as a historic resource, and the historic district commission must review such an application in accordance with section 24-227.4.

(~~9~~12) The planning commission may, upon request of the applicant, grant an adjustment to the dimensional restrictions of an antenna or equipment cabinet provided the applicant demonstrates that the increased size of the facility is integrated into the structure and limits the visual impact to the maximum extent possible.

(~~10~~13) Public property.

(i) A~~private small cell~~ telecommunicationsfacility may be located on public property or attached to an existing structure owned or operated by the city and shall be a permitted use in all zones. The use of any property owned or operated by the city shall be at the discretion of the city council and shall not be subject to the same conditions and requirements as are applicable to such facilities on privately owned property. The city council ~~may but is not required to~~shallhold a public hearing or meeting prior to its decision to allow the use of property owned or under the control of the city.

(ii) A ~~private small cell~~ telecommunications facility may be located on public property or attached to an existing structure owned or operated by a county, state, federal or other non-city governmental agency or on the property of an independent fire department or rescue squad subject to the same conditions and requirements as are applicable to such facilities on privately owned property.

(iii) ~~In addition to any other requirements imposed by the city manager under Chapter 19, a~~ Aprivate small cell telecommunications facility may be located in city right-of-way or attached to an existing structure in city right-of-way subject to applicable

requirements set forth in Right-of-Way standards adopted by regulation pursuant to section 2-10 of this Code~~at least to the following conditions:~~

~~a. At a height of at least fifteen (15) feet if located on a support structure.~~

~~b. To the extent possible, all cables connecting antennas to related equipment shall be contained inside the pole or support structure or shall be flush mounted and covered with a metal, plastic or similar material cap matching the color of the pole or structure on which it is installed.~~

~~c. All related equipment shall have a maximum height of four (4) feet and a total maximum footprint of twenty five (25) cubic feet on a support structure or ground and thirty-six (36) cubic feet on a rooftop or within a building.~~

~~d. The applicant shall provide proof that it is a licenses provider or public utility and will comply with all applicable federal, state and city laws and regulations, including those regarding wireless communications services.~~

(1~~1~~4) All such ~~small cell~~ telecommunications facilities, including visible cables shall be located and designed so as to minimize visual impact on surrounding properties and from public streets to the extent possible.

(1~~2~~5) No signs are permitted in connection with any ~~small cell~~ telecommunications facilities, except as required by law.

(1~~3~~6) No lights are permitted on any monopole or antenna, except as required by law.

(1~~4~~7) All ~~small cell~~ telecommunications facilities are subject to the requirements of subsection (1)(xi).~~must be removed at the cost of the owner when the facility has not been operated for a continuous period of six (6) months. Such a facility must be removed within ninety (90) days after receiving a removal notice from the city.~~

(18) The City may permit installation of a telecommunications facility, or attachment to or construction of a supporting structure not otherwise permitted under this section, where an applicant submits proof that absent approval, it would be effectively prohibited from providing personal wireless services, as that term is defined applicable federal law.

(19) Notwithstanding the foregoing, a wireless communications facility meeting the requirements below may be approved by Staff:

(a) No excavation is required in connection with the installation of the telecommunications facility, or facilities required for its operation and no new support structure is required; and

(b) No hazardous materials may be located at the site; and

(c) The telecommunications facility will not be located on or within an historic structure, or in an historic district, where any portion of the telecommunications facility would be visible from ground level; and

(d) The telecommunications facility is one (1) cubic foot or less in size, and strand-mounted; if any other wireless facility is supported by the same strand is within 50 feet of the proposed facility, the facilities willcumulatively total two(2) cubic feet or less in size; or

(e) The telecommunications facility is a modification or replacement of an approved, existing facility, where the modification does not involve changes in the supporting structure, or the size, noise levels, appearance, location or visibility of the telecommunications facility.

RIGHT-OF-WAY USE
AND FRANCHISE AGREEMENT

THIS RIGHT-OF-WAY USE AND FRANCHISE AGREEMENT ("Use Agreement") is dated of _____, _____, (the "Effective Date"), and entered into by and between the CITY OF GAITHERSBURG, a municipal corporation of the State of Maryland (the "City") and _____, a _____ ("Company").

WHEREAS, the City has made significant investment of time and resources in the acquisition and maintenance of the Public Way (as defined below) and such investment has enhanced the utility and value of these assets; and

WHEREAS, the right to access and/or occupy portions of the Public Way for the business of providing communication services is a valuable economic privilege and beneficial competition between providers of communications services can be furthered by the City's provision of grants of location and rights to use the Public Ways on non-discriminatory and competitively neutral terms and conditions; and

WHEREAS, Company owns, constructs, operates, maintains, and controls, in accordance with regulations promulgated by the Federal Communications Commission ("FCC"), including Radio Frequency ("RF") rules and regulations, and Maryland Public Service Commission ("PSC") a fiber-based telecommunications Network or Networks (as defined below) serving Company's wireless carrier customers and utilizing microcellular optical repeater Equipment certified by the FCC; and

WHEREAS, for purpose of operating the Network, Company wishes to locate, place, attach, install, operate, control, and maintain, upgrade and enhance Equipment (as defined below) in the Public Way ; and

WHEREAS, the City is willing to permitCompany's non-exclusive use at approved locations in its Public Ways, to the extent it may lawfully do so and in accordance with the terms and conditions of this Use Agreement and pursuant to permits issued by the City, the installation of Company's Equipment in the Public Way; and

WHEREAS, Company is willing to compensate the City in exchange for the grant and right to use and physically occupy portions of Public Way.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree to the following covenants, terms, and conditions.

1. DEFINITIONS. The following definitions shall apply generally to the provisions of this Use Agreement.

1.1 Affiliate: When used in relation to Company, means another entity that owns or controls, is owned or controlled by, or is under common ownership or control with Company.

1.2 Applicable Standards: Means all applicable engineering and safety standards governing the installation, maintenance, operation of facilities and the performance of all work in or around Poles and other Municipal Facilities and includes the most current versions of the National Electric Safety Code ("NESC"), the National Electrical Code ("NEC"), the regulations of the Federal Communication Commission ("FCC") and the Occupational Safety and Health Administration ("OSHA"); and the provisions of the City's Right-of-Way regulations, building and zoning codes, each of which is incorporated by reference in this Agreement; and other reasonable safety and engineering requirements of the City or other federal, State authority with jurisdiction over Poles of City Facilities.

1.3 Attaching Entity: Means any public or private entity, including Company that, pursuant to a license agreement with the City, places an Attachment on a Pole.

1.4 Attachment(s): Means Communications Facilities that are placed directly on Poles, including radios, antenna, and associated cables and hardware, as approved in writing by the Director of Public Works and filed with the Department of Public Works prior to their placement on Poles.

1.5 Authorizations: Means the applicable permissions Company must obtain to deploy or operate the Network and/or provide Services, which may include Use Agreements; licenses, permits, zoning approvals; variances, exemptions, grants of authority to use private rights of way and/or easements or facilities, agreements to make attachments to poles, ducts, conduits, manholes, and the like; and any other applicable approval of a governmental authority or third persons with respect to (i) the construction, installation, repair, maintenance, operation or use of tangible or intangible property, as the case may be, or (ii) any applicable requirement by a governmental authority for the engagement in a business or enterprise.

1.6 Base Station: Means mobile telecommunications equipment for reception and/or transmission, such as microcell antennas and associated equipment (amplifiers, connective cabling, batteries), to support the facility.

1.7 Capacity: Means the ability of a Pole to accommodate an Attachment based on the Applicable Standards, including space and loading considerations.

1.8 City: Means the City of Gaithersburg, Maryland, and may also be referred to in conjunction with Company as the Party, Other Party, or Parties collectively.

1.9 Communications Facilities: Means all property of Company, including fiber optic cable, enabling the provision of Communications Service utilizing the Company's Distributed Antenna System in the City.

1.10 Communication Services: Means wireless and wireline access, transmission, and transport of commercial mobile radio services and private mobile services, as those terms are defined in 47 U.S.C. §332, as amended from time to time, that are provided by Company or its Affiliates using the Network pursuant to, and authorized by, federal or state law.

1.11 Conduit: Means enclosed underground raceways capable of protecting fiber optic and other communications and electrical cables, including associated individual ducts, inner ducts, manholes, handholes, vaults, pull-boxes, and trenches.

1.12 Construction Drawings: Means a complete set of plans and diagrams accurately depicting conditions of the installation of Attachment on Poles. Construction Drawings must be stamped by a Maryland registered professional engineer and demonstrate adherence to all Applicable Standards. Construction Drawings must include, at a minimum:

1.12.1 One drawing of the Pole prior to installation of any Attachments;

1.12.2 One drawing of the Pole subsequent to installation of all Attachments;

1.12.3 Details of the Pole base, concrete footing, anchor bolts, and connecting Conduit containing electric and fiber optic cables.

1.12.4 Details of all Attachments, including their dimensions, color and weights; and

1.12.5 Structural analyses and load calculations of the Pole with all installed Attachments for dead, live, wind, and ice loading, sufficiently demonstrating that the Communications Facilities shall not adversely affect the structural integrity of the Pole of other City Facilities.

1.13 Decorative Streetlight Pole: Means any Streetlight Pole that incorporates artistic design elements not typically found in standard-design or conventional steel, concrete, or aluminum Streetlight poles.

1.14 Distributed Antenna System or DAS: Means a Network of multiple, spatially separated antenna Nodes connected to a common source via a high capacity transport medium (such as fiber optic cable), for the purpose of providing wireless Communications Service within a geographic area.

1.15 Emergency: Means a situation that, in the reasonable discretion of the City or Company, if not remedied immediately, poses an imminent threat to public health, life, or safety, damage to property or a service outage.

1.16 Equipment: Means the optical converters, power amplifiers, radios, DWDM and CWDM multiplexers, microcells, remote radioheads, antennas, fiber optic and coaxial cables, wires, meters, pedestals, power switches, and related equipment, whether referred to singly or collectively, to be installed or operated by Company hereunder.

1.17 Equipment Housing: Means mobile telecommunications equipment such as amplifiers, batteries, etc. It excludes the electrical meter and any associated antenna.

1.18 Fee: Means any assessment, license, charge, fee, imposition, tax, or levy of general application to entities doing business in the City lawfully imposed by a governmental body (but excluding any utility users' tax, Use Agreement fees, communications tax, or similar tax or fee).

1.19 Gross Revenue: Means all revenue, as determined in accordance with generally accepted accounting principles, which is derived by Company or any of its Affiliates from the operation of the Network in the City to provide Communication Services. Gross Revenue shall include by way of example and without limitation: monthly or annual per-site payments made to Company by its customers for the provision of Communication Services enabled by its Communications Facilities located in the City's Public Way; any revenue generated by Company through any means that has the effect of avoiding the payment of compensation that would otherwise be paid to the City for the rights granted to Company in this Use Agreement; late fees and administrative fees; revenue derived from forfeited deposits; revenue derived from commissions; any actual bad debt that is written off but subsequently collected (such bad debt shall be included as Gross Revenue for the period in which it is collected); and other revenues that may be posted in the general ledger as an offset to an expense account. Gross Revenue shall not include: any revenues received by Company for the construction of Network facilities in the City; any compensation awarded to Company based on the City's condemnation of property of Company; and to the extent consistent with generally accepted accounting principles, consistently applied, actual bad debt write-offs taken in the ordinary course of business.

1.20 ILEC: Means the Incumbent Local Exchange Carrier that provides basic telephone services, among other telecommunications services, to the residents of the City.

1.21 Installation Date: Means the date that the first Equipment is installed by Company pursuant to this Use Agreement.

1.22 Interconnecting Wire Cabling: Means wire or cabling connecting the Equipment Housing and Antenna and any underground power or other supporting wire interconnections to third party providers of connectivity.

1.23 Laws: Means any and all applicable and lawful statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, tariffs, administrative orders, certificates, orders, or other requirements of the City, State, United States, Federal Communications Commission, or other governmental agency having joint or several jurisdiction over the parties to this Use Agreement.

1.24 Company: Means _____, a _____ and its lawful successors, assigns, and transferees, and may also be referred to in conjunction with the City as the Party, Other Party, or Parties collectively.

1.25 Mid-Wire Base Stations: Means mobile telecommunications equipment for reception and/or transmission that are installed on existing above ground wires.

1.26 Municipal Facilities: Means any City-owned Streetlight Poles, Decorative Streetlight Poles, lighting fixtures, or electroliers (collectively "City-owned Poles" or "City Poles") located within the Public Way, but not including traffic lights, and may refer to such facilities in the singular or plural, as appropriate in the context in which used, except that the City reserves the right to exclude certain categories of City-owned Poles, or a specific City-owned Pole(s) from consideration for Attachments under this Use Agreement, including City-owned Poles located within a historic district.

1.27 Occupancy: Means the use or reservation of space for Attachments on a Pole.

1.28 Network: Means one or more of the neutral-host, protocol-agnostic, fiber-based optical converter DAS or Small Cells networks, or portions of those networks, owned or operated by Company and located within the City.

1.29 Node: Means an electronic device that is attached to the Network, and is capable of creating, receiving, or transmitting information over a communications channel.

1.30 Pedestals/Vaults/Enclosures: Means above or below-ground housings that are not attached to Poles but are used to enclose a cable/wire splice, power supplies, amplifiers, passive devices, and/or to provide a service connection point.

1.31 Permit: Means, depending on the context, written or electronic authorization by the City for Company to make, maintain or remove Attachments to specific Poles pursuant to the requirements of this Use Agreement and the City Code and regulations or to perform work in or occupy the City's Public Way.

1.32 Permit Application: Means, depending on the context, an application by Company to occupy or perform work in a City Public Way or an application to attach wireless equipment to a City-owned pole or other facility, or both.

1.33 Pole: Means a pole whether owned or controlled by the City, by Company, or a third party and capable of supporting Attachments for Communications Facilities.

1.34 Pole Make-Ready or Make-Ready Work: Means all work that is reasonably required to safely accommodate the installation of Company's Communications Facilities on Poles and/or to comply with all Applicable Standards. Make-Ready Work may be conducted by the City, by Company, or a third party utility owner of a Pole(s). Such work may include, but is not limited to repair, rearrangement, replacement and construction of Poles; inspections, engineering work and certification; permitting work; tree trimming (other than tree trimming performed for normal maintenance purposes); site preparation; and electrical power configuration. Make-Ready Work does not include Company's routine maintenance.

1.35 Post-Construction Inspection: Means the inspection by the City or Company, or some combination of both, to verify that the Attachments have been made, and Mark-Ready Work performed, in accordance with Applicable Standards and the Permit.

1.36 Pre-Construction Survey: Means all work, inspections or operations required by Applicable Standards and/or the City to determine the Make-Ready Work necessary to accommodate Company's Communications Facilities on a Pole. Such work includes, but is not limited to, field inspection and administrative processing.

1.37 Public Way: Means the space in, upon, above, along, across, and over the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lands, and places, including all public utility easements and public service easements as the same now or may hereafter exist, that are under the jurisdiction of the City. This term shall not include (a) any county, state, or federal rights of way or any property owned by any person or entity other that the City, except as provided by applicable Laws or pursuant to any agreement between the City and any such person or entity, or (b) any property owned by the City, such as a park or property on which City buildings are located, that is not a street or right-of-way.

1.34. PSC: Means the Maryland Public Service Commission.

1.35. Reserved Capacity: Means capacity or space on a Municipal Facility that the City has reserved for its own future City requirements at the time of the Permit grant, including the installation of communications Attachments for governmental purposes.

1.36. Riser: Means metallic or plastic encasement materials placed vertically on or within a Pole to guide and protect wires and cables.

1.37. Services: Means "Communications Services".

1.38. "Small Cell": Means a wireless communications technology installation similar to a DAS network, as the term is generally known in the industry.

1.39 Streetlight Pole: Means any standard-design or conventional concrete, fiberglass, metal, or wooden pole used for street lighting or decorative purposes.

1.40. Tag: Means to place distinct markers on Communications Facilities, coded by color or other means, specified by the City or, if not specified by the City, consistent with local industry standards, that will readily identify the type of Attachment (e.g., cable TV, telephone, high-speed broadband data, public safety) and its owner.

1.41. Unauthorized Attachment: Means any Communications Facilities that do not the definition of the term "Attachment" provided in this Use Agreement and which are placed on Pole(s) without the approval required by this Use Agreement. The term includes any structure on a City Public Way not authorized by this Use Agreement and the City Code.

2. TERM.

2.1 Term. This Use Agreement and the franchise granted hereunder shall become effective upon the approval of the City Council and submission to the City by the Company of a certificate of liability insurance, bonds, and Public Service Commission authority to operate in the Right-of-Way as a public utility, as provided herein, and, if not terminated in accordance with other provisions of this Use Agreement, shall continue in effect for a term of ten (10) years and, unless terminated by either party, shall automatically be renewed for three (3) additional five (5) year terms. Either party may terminate this Use Agreement at the end of the initial term or a successor term by giving written notice of intent to terminate the Use Agreement at the end of the then-current term. Such a notice must be given least thirty (30) calendar days prior to the end of the then-current term.

2.2 Exercise of Police Power. All rights and privileges granted hereby are subject to the police power of the City to adopt and enforce local laws, rules and regulations necessary to protect the health, safety and general welfare of the public consistent with any other requirements under the laws of the State of Maryland. Expressly reserved to the City is the right to adopt, now and in the future, in addition to the provisions of the Franchise and existing laws, ordinances and regulations, such additional laws and regulations as it may find necessary in the exercise of its police power and Company shall comply with all laws, ordinances and regulations, now existing and hereafter adopted whether local, State or Federal.

3. FRANCHISE AGREEMENT.

3.1 Nature of Franchise. The City hereby grants the Company for the period of the Term, subject to the terms and conditions of this Use Agreement, a nonexclusive franchise providing the right and consent to install, operate, repair, maintain, remove and replace cable, wire, fiber (or other transmission medium that may be used in lieu of cable, wire or fiber) and related Equipment and facilities on, over and under the City owned Public Way, for the provision of Company's telecommunications services, provided; however, that such grant is expressly limited to the locations, facilities and services for which the Company receive a permit from the City. Before offering or providing any Services using the facilities, the Company shall obtain

any and all regulatory approvals, permits, authorizations and licenses for the offering or provision or such Services from appropriate federal, state, and local authorities, as required, and shall submit to the City evidence of all such approvals, permits, authorizations or licenses.

3.2 Conditions and Limitations on Franchise

3.2.1 Nothing in this Use Agreement shall affect the right of the City to grant to any Person a franchise, consent or right to occupy and use the Public Way, or any part thereof, for the construction, operation and/or maintenance of a system to provide any services (including without limitation mobile telecommunications services), except that the City agrees not to subsequently grant franchises in a manner that would unfairly and adversely affect the Company's pole allocation priority as set forth in Appendix A, attached hereto.

3.2.2 Nothing in this Use Agreement shall abrogate the right of the City (itself or through its contractors) to construct, operate, maintain, repair or remove any public works or public improvement of any description.

3.3 No Waiver. Nothing in this Use Agreement shall be constructed as a waiver of any codes, ordinances or regulations of the City or of the City's right to require the Company or Persons utilizing the facilities to secure the appropriate permits or authorizations for such use.

3.4 No Release. Except as expressly set forth in this Use Agreement, nothing in this Use Agreement shall be construed as a waiver or release of the rights of the City in and to the Public Way. In the event that any of the Public Way is eliminated, discontinued, closed or abandoned, all rights and privileges granted pursuant to this Use Agreement with respect to said Public Way, or any part thereof to eliminated, discontinued, closed or abandoned, shall cease upon the effective date of such elimination, discontinuance, closing or abandonment. The City shall use reasonable efforts to provide reasonable prior notice to the Company of any such elimination, discontinuance, closing or abandonment.

4. SCOPE OF USE AGREEMENT.

Any and all rights expressly granted to Company under this Use Agreement, which shall be exercised at Company's sole cost and expense, shall be subject to the prior and continuing right of the City under applicable Laws to use any and all parts of the Public Way exclusively or concurrently with any other person or entity, and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect the Public Way. Nothing in this Use Agreement shall be deemed to grant, convey, create, or vest in Company an interest in any structure, real estate or land, including any fee, leasehold interest, or easement, and neither this Use Agreement nor any permit issued pursuant hereto or to any provision of applicable Law shall constitute an assignment of any of the City's rights in or to any Municipal Facility. Any work performed pursuant to the rights granted under this Use Agreement shall be subject to the reasonable prior review and approval of the City and shall after approval be subject to regulation by the City, in compliance with local, state and Federal law.

4.1 Attachment to Municipal Facilities. Subject to the terms and conditions herein and the requirements of applicable Law, the City hereby authorizes and permits Company to enter upon the Public Way and apply for permits as provided in this Use Agreement to enter into a lease agreement allowing Company to locate, place, attach, install, operate, maintain, control, remove, reattach, reinstall, relocate, and replace Equipment in or on Municipal Facilities for the purposes of operating the Network and providing Services. Unless otherwise agreed, to the extent Company requires electric service for its Communications Facilities, it shall obtain such power pursuant to standard application to the electric utility company at its sole cost and expense. Unless specifically agreed, Company shall not tap into or otherwise utilize the City's electric service at a Pole. The City agrees that it will cooperate with Company in its efforts to obtain utilities from a location provided by City or the servicing utilities.

4.2. Attachment to Third-Party Property. Subject to applicable Law and to Company obtaining the written permission of the owner(s) of the affected property and showing (1) a need for the attachment to provide uninterrupted wireless services and (ii) that no less intrusive alternative is available, the City hereby authorizes and permits Company to enter upon the Public Way and, subject to the permission of the appropriate owner and the City pursuant to the provision of Section 6 and any applicable design, installation or maintenance requirements the City may impose or pursuant to the City Code and regulations to locate, place, attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace such number of Small Cell or DAS Equipment in or on poles located within the Public Way. Only where third-party poles or other property is not available for attachment of Equipment, Company may install its own poles in the Public Way, consistent with the requirements that the City imposes on similar installations made by other utilities that use and occupy the Public Way, including, but not limited to the requirement to underground Equipment if other utilities are requirement to do so.

4.3. Preference for Municipal Facilities. In any situation where Company hasa choice of attaching its Equipment to either Municipal Facilities or third-party-owned property in the Public Way, Company agrees to attach to the Municipal Facilities, provided that such Municipal Facilities are at least equally suitable functionally for the current and future operation of the Network.

4.4. No Interference. Company, in the performance and exercise of its rights and obligations under this Use Agreement, shall not interfere in any manner with the existence and operation of the Public Way or any and all private rights of way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, and other telecommunications, utility, City property or the original intent of the use of the Public Way, without the express written approval of the owner or owners of the affected property or properties, except as permitted by applicable Laws or this Use Agreement.

4.5. Use of City Conduit. For the deployment of new fiber optic cable in the Public Way to connect Communications Facilities, and for which Conduit is required, Company may, but is not required, to use existing City-owned Conduit subject to separate agreement by the parties. In the event the parties do not reach such agreement, or there is no available, existing

City-owned Conduit or Company-owned conduit to access the Poles, Company may in coordination with the City, construct additional Conduit in the Public Way. All such construction shall be consistent with City requirements and specifications. This Use Agreement does not contemplate or authorize the installation or operation of cables within City owned Conduit, and such use will only be allowed pursuant to a separately negotiated conduit use agreement or rider hereto.

4.6. Permit Issuance Conditions. The City will issue one or more Permit(s) to Company only when the City determines, in its sole judgment, exercised reasonably, that, in the case of the use of Municipal Facilities, there is sufficient Capacity to accommodate the requested Attachment(s), and that in all cases (i) Company meets all requirements set forth in this Use Agreement, and (ii) such Permit(s) comply with all Applicable Standards and with applicable Law, including, without limitations, all regulations adopted pursuant to the City Code.

4.7. Reserved Capacity. Access to space on Municipal Facilities will be made available to Company with the understanding that said Municipal Facilities will be subject to Reserved Capacity for future City use. On giving Company at least sixty (60) calendar day's prior notice, City may claim such Reserved Capacity at any time following the installation of Company's Attachment if required for the City's future public service requirements. Where possible, City shall give Company the option to remove its Attachment(s) from the affected Municipal Facility or Municipal Facilities or to pay for the cost of any Make-Ready Work needed to accommodate the City's needs while maintaining Company's Attachment on the affected City-owned Pole(s). Company shall be responsible for the costs of removing its Communications Facilities or rearranging the City-owned Pole to accommodate the City's Attachments. Notwithstanding the above, any City-owned Pole that has been enlarged, replaced, or otherwise improved by Company at its expense, shall not be subject to Reserved Capacity to the extent of such enlargement, replacement, or improvement.

4.8. City's Rights Over City-owned Poles. The parties agree that this Use Agreement does not in any way limit the City's right to locate, operate, maintain, or remove City-owned Poles in the manner that will best enable it to fulfill its service, safety, and vehicular and pedestrian transportation requirements or to comply with any federal, state, or local legal requirement.

4.9. Other Agreements. Except as expressly provided in this Use Agreement, nothing in this Use Agreement shall limit, restrict, or prohibit the City from fulfilling any agreement or arrangement regarding City-owned Poles into which the City has previously entered, or may enter in the future, with others not party to this Use Agreement.

4.10. Permitted Uses. This Use Agreement is limited to the uses specifically stated in the recitals set forth above, and no other use of the Public way or Municipal Facilities shall be allowed without the City's express written consent to such use. Nothing in this Use Agreement shall be construed to require the City to allow Company to use City-owned Poles or City-owned Conduit after the termination of this Use Agreement.

4.11. Enclosures. Company shall not place Base Stations, Pedestals or Vaults without the City's prior written permission. If permission is granted, all such installations shall be subject to, and in compliance with, the Applicable Standards and applicable Law. Such permission shall not be unreasonably withheld. Further, Company agrees to move any such above-ground Pedestals or Vaults in order to provide sufficient space for the City to set a replacement City-owned Pole.

4.12. Closing of Public Ways. Nothing in this Use Agreement shall be construed as a waiver or release of the rights of the City in and to the Public Ways. In the event that all or part of the Public Ways within an area of the City are (1) closed to pedestrian and/or vehicular traffic and/or utilities and services comparable to Services; or (2) vacated or if ownership of the land under the affected Public Ways is otherwise transferred to another Person, all rights and privileges granted pursuant to this Use Agreement with respect to such Public Ways, or any part of such Public Ways so closed, vacated, or transferred, shall cease upon the effective date of such closing, vacation, or transfer, and Company shall remove its Network and Equipment from such Public Ways. If such closing, vacation, or transfer of any Public Way is undertaken for the benefit of any private person, the City shall, as appropriate, condition its consent to such closing, vacation, or transfer of such Public Way on the agreement of such private person to: (i) grant Company the right to continue to occupy and use such Public Way; or (ii) reimburse the Company for its reasonable costs to relocate the affected part of the Network. The City shall provide reasonable prior notice to Company of any such closing, vacation, or transfer to allow Company to remove its Network where the right to continue to occupy and use such Public Way is not reserved for Company.

4.13. Compliance with Laws. Company shall comply with all applicable Laws in the exercise and performance of its rights and obligations under this Use Agreement. Company shall apply for, at its sole cost and expense, and obtain all applicable federal, state, county, and City permits and/or Authorizations required in order to install, construct, operate, maintain, or otherwise implement and use its Network and Equipment in the Public Way, including, but not limited to, a right-of-way construction permit, building permits, and any applicable variance, conditional use permit, ministerial permit, or special exception required under the City Code or the City's zoning regulations. Company shall pay, as they become due and payable, all fees, charges, taxes and expenses, associated with such permits and/or other Authorizations. If Company is unable to obtain any necessary permits or Authorizations as required in this Section, Company shall have the right, without obligation, to terminate this Use Agreement immediately.

5. COMPENSATION; UTILITY CHARGES. Company shall be solely responsible for the payment of all lawful Fees in connection with Company's performance under this Use Agreement, including those set forth below.

5.1. Annual Attachment Fee. In order to compensate the City for Company's entry upon, deployment within the Public Way, attachment to, and use of, Municipal Facilities, Company shall pay to the City an annual fee (the "Annual Fee") in the amount of Five Hundred Dollars ($500.00) for each individual use of each Municipal Facility thereafter, if any, upon which Equipment has been installed pursuant to this Use Agreement. For the purpose of calculating the Annual Fee remittance, all Equipment attached by Company to one Municipal

Facility shall constitute one installation and therefore a single use of a Municipal Facility. The City represents and covenants that the City owns all Municipal Facilities for the use of which it is collecting from Company the Annual Fee pursuant to this§ 4.1. The Annual Fee shall be payable in advance, invoiced on a fiscal year basis, and prorated based upon the date of issuance of a Permit for an Attachment.

5.1.1. CPI Adjustment. Annually on each anniversary of this Use Agreement during the term, the Annual Fee shall be adjusted by a percentage amount equal to the percentage change in the U.S. Department of Labor, Bureau of Labor Statistics Consumer Price Index (All Items, All Urban Consumers, 1982-1984= 100) for the Washington, D.C. - Baltimore Metropolitan Statistical Area.

5.2. Right of Way Use Fee. In order to compensate the City for Company's entry upon and deployment of Equipment within the Public Way, Company shall pay to the City, on an annual basis, an amount equal to five percent (5%) of Gross Revenues (the "Right-of-Way Fee"). The Right-of-Way Fee shall be payable for the period commencing with the Effective Date and ending on the date of termination of this Use Agreement. Company shall make any payment of the Right-of-Way Fee that may be due and owing within thirty (30) days after the first anniversary of the Effective Date and within the same period after each subsequent anniversary of the Effective Date. Within thirty (30) days after the termination of this Use Agreement, the Right-of-Way Fee shall be paid for the period elapsing since the end of the last calendar year for which the Right-of-Way Fee has been paid. Company shall furnish to the City with each payment of the Right-of-Way Fee a statement, executed by an authorized officer of Company or his or her designee, showing the amount of Adjusted Gross Revenues for the period covered by the payment. If Company or the City discovers any error in the amount of compensation due, the City shall be paid within thirty (30) days of discovery of the error or determination of the correct amount. Any overpayment to the City through error or otherwise shall be refunded or offset against the next payment due. Acceptance by the City of any payment of the Right-of-Way Fee shall not be deemed to be a waiver by the City of any breach of this Use Agreement occurring prior thereto, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a larger amount was actually due or from collecting any balance due to the City. On an annual basis, Company shall provide to the City a financial statement describing services provided within the City and Gross Revenues received from such services.

5.3. Accounting Matters. Company shall keep accurate books of account at its principal office, or such other location of its choosing for the purpose of determining the amounts due to the City under §§ 5.1 and5.2 above. Company shall at their cost provide such books of account to the City at a location of the City's choosing for review by the City or a City representative. The City may inspect Company's books of account relative to the City at any time during regular business hours on thirty (30) days' prior written notice and may audit the books from time to time at the Company's sole expense, but in each case only to the extent necessary to confirm the accuracy of payments due under §§ 5.1 and5.2 above. The City agrees to hold in confidence any non-public information it learns from Company to the fullest extent permitted by Law.

5.4. Most-Favored Municipality. Should Company, after the parties' execution and delivery of this Use Agreement, enter into a pole attachment or right-of-way use agreement with another municipality of the same size or smaller than the City in the state of Maryland, which agreement contains financial benefits for such municipality which, taken as a whole and balanced with the other terms of such agreement, are in the City's opinion substantially superior to those in this Use Agreement, the City shall have the right to require that Company modify this Use Agreement to incorporate the same or substantially similar superior benefits and such other terms and burdens by substitution, mutatis mutandis, of such other agreement or otherwise.

5.5. Application Fee. To address City's costs incurred relating to inspection and application processing, Company shall be charged a non-refundable Application Fee of five hundred dollars ($500.00) for each Pole for which it seeks to install a new Pole or make an Attachment. The City reserves the right to adjust the Application Fee from time to time to cover actual and documented costs incurred in processing Applications. Failure to include Application Fees will cause the Application(s) to be deemed incomplete, and the City will not process such Application(s) until the Application Fees are paid. The City will make timely and reasonable efforts to contact Company should its Application Fee not be received.

5.6 Refunds. No Fees or other charges specified herein shall be refunded on account of any surrender of an Attachment Permit granted under this Use Agreement, except in the case of the City's default.

5.7 Late Charge. If the City does not receive payment for any Fee or other amount owed within thirty (30) calendar days after it becomes due, Company shall pay interest to City at the rate of one and one-half percent (1.5%) per month.

5.8 Charges and Expenses. Company shall reimburse the City and any other Attaching Entity for those actual and documented costs, including without limitation the cost of Make-Ready-Work, for which Company is otherwise responsible under this Use Agreement.

5.9. Advance Payment. The City in its sole discretion will determine the extent to which Company will be required to pay in advance estimated costs, including, but not limited to, administrative, construction, inspections, and Make-Ready Work costs, in connection with the initial installation or rearrangement of Company's Attachments pursuant to the procedures set forth in Articles 10 and 15 below.

5.10 True-Up. Whenever the City, in its discretion, requires advance payment of estimated expenses prior to undertaking an activity on behalf of Company and the actual cost of the activity exceeds the advance payment of estimated expenses, Company agrees to pay City for the difference in cost, provided that City documents such costs with sufficient detail to enable Company to verify the charges. To the extent that City's actual cost of the activity is less than the estimated cost, City shall refund to Company the difference in cost.

5.11. Determination of Charges. Wherever this Use Agreement requires Company to pay for work done or contracted by the City, the charge for such work shall include all reasonable material, labor, engineering, administrative, and applicable overhead costs. The City

shall bill its services based upon actual and documented costs, and such costs will be determined in accordance with the City's cost accounting systems used for recording capital and expense activities. All such invoices shall include an itemization of dates of work, location of work, labor costs per hour, persons employed, and costs of materials used.

5.12. Work Performed by City. Wherever this Use Agreement requires the City to perform any work, City, in its sole discretion, may utilize its employees or contractors, or any combination of the two, to perform such work.

5.13. Charges for Cancelled Applications. If an Agreement Application is submitted by Company and then steps are taken by the City with regard to the Agreement Application by performing necessary administrative and engineering work, and the Agreement Application is subsequently canceled prior to the issuance of a Permit, Company shall reimburse the City for all of the actual and documented costs incurred by the City through the date of cancellation, including engineering, clerical and administrative costs.

5.14. Other Compensation. As additional compensation for the attachment rights granted herein, in the event that Company installs fiber to serve any Company facility within the City's Public Way, Company shall grant the City an indefeasible right to use two (2) strands of fiber optic cable to be utilized for municipal uses only, for each Attachment for which a Permit is issued under the terms of this Use Agreement for the deployment of fiber optic cable if any, as provided in Section 4.5 of this Use Agreement.

5.15. Fee Payments. Unless otherwise directed, all Fee payments to the City should be mailed to the following address and to the attention of:

Director of Finance
City of Gaithersburg
31 S Summit Avenue
Gaithersburg, MD 20877

5.16. Electricity Charges. Company shall be solely responsible for the payment of all electrical utility charges to the applicable utility company based upon the Equipment's usage of electricity and applicable tariffs. For Municipal Facilities, Company is required to obtain a separate utility meter for measurement of usage.

5.17. Taxes. Company shall be solely responsible for the payment of any fees or taxes, in the event such fees or taxes are imposed by the City, Montgomery County, the State of Maryland or the Federal government in connection with Company's performance and installation of equipment under this Use Agreement.

6. CONSTRUCTION.

Company shall comply with all applicable and lawful federal, State, and City codes, regulations specifications, and requirements, if any, related to the construction, installation, operation, maintenance, and control of Company's Equipment installed in the Public Way and on Municipal

Facilities in the City. If Company does not repair the site as required herein, the City shall have the option, upon thirty (30) days' prior written notice to Company, to perform or cause to be performed such reasonable and necessary work on behalf of Company and to charge Company for the costs incurred by the City at the City's standard rates, as well as a reasonable administrative fee to coordinate inspections, reviews and issuance of permits or denials. Upon the receipt of a demand for payment by the City, Company shall promptly reimburse the City for such costs. Company shall not attach, install, maintain, or operate any Equipment in or on the Public Way and/or on Municipal Facilities without the prior approval of the City for each location.

6.1. Obtaining Required Permits for Work in Public Way. If the attachment, installation, operation, maintenance, or location of the Equipment in the Public Way shall require any permits, for each permit Company shall, if required under applicable City ordinances or regulations, apply for the appropriate permits and pay any standard and customary permit fees. Approval of such a permit shall be based upon whether the Equipment meets the requirements of the City's Right-of-Way Regulations.

6.1.1 Specific Application Requirements. An application or permit shall specify whether the municipal facility is currently in use as a wireless communication base and whether an individual utility meter can be provided if electricity is needed.

6.1.3 Location List. Upon the completion of initial installations, Company shall furnish to the City a list indicating the location(s) of the Equipment in the Public Way, and shall update that list annually.

6.2. Relocation and Displacement of Equipment. Company understands and acknowledges that the City may require Company to relocate one or more of its Equipment installations on a City-owned Pole at Company's expense. Company shall at the City's direction relocate such Equipment, whenever the City reasonably determines that the relocation is needed for any of the following purposes: (a) if required for the construction, completion, repair, relocation, or maintenance of a City project; (b) because the Equipment is reasonably considered to be interfering with or adversely affecting proper operation of City-owned Poles, traffic signals, or other Municipal Facilities; or (c) to protect or preserve the public health or safety. If Company shall fail to relocate any Equipment as requested by the City within a reasonable time under the circumstances in accordance with the foregoing provision, the City shall be entitled to remove or relocate the Equipment, without further notice to Company and to charge the Company the cost thereof. To the extent the City has actual knowledge thereof, the City will attempt promptly to inform Company in writing of the displacement or removal of any pole on which any Equipment is located.

6.3. Relocations at Company's Request. In the event Company desires to relocate any Equipment from one Municipal Facility to another, Company shall so advise the City, and may do so upon City approval of a new application, at its own expense. The City will use its best efforts to accommodate Company by making another reasonably equivalent Municipal Facility available for use in accordance with and subject to the terms and conditions of this Use Agreement.

6.4. Damage to Municipal Facilities and Public Way. Whenever the removal or relocation of Equipment is required or permitted under this Use Agreement, and such removal or relocation shall cause the Public Way to be damaged or harmed in any way, including cosmetic damage, Company, at its sole cost and expense, shall promptly repair and return the Public Way in which the Equipment is located to a safe and satisfactory condition in accordance with applicable Laws. If Company does not repair the site as just described, then the City shall have the option, upon thirty (30) days' prior written notice to Company, to perform or cause to be performed such reasonable and necessary work on behalf of Company and to charge Company for the proposed costs to be incurred or the actual costs incurred by the City at the City's standard rates, except that for repairs needed to protect public health or safety, the City can proceed with the repair on an emergency basis after providing Company with prior notice. Upon the receipt of a demand for payment by the City, Company shall promptly reimburse the City for such costs.

7. SPECIFICATIONS.

7.1. Installation. When a Permit is issued pursuant to this Use Agreement, Company's Equipment shall be installed and maintained in accordance with the regulations, requirements and specifications of the City and must comply with all Applicable Standards. Company shall be responsible for the installation and maintenance of its Equipment. All Company's activities shall be undertaken without the attachment of any liens to the Company's Equipment.

7.2. Installation Plan. The installation of Facilities shall be made in accordance with plans and specifications approved by the City, and after obtaining all necessary and applicable permits for all work in the Public Way. Company shall submit to the City's Department of Public Works an initial installation plan, and any subsequent work plans concerning installations not addressed in the initial work plan, which shall include fully dimensioned site plans and specifications that are drawn to scale and show (1) the specific Equipment, (2) the specific proposed location of such Equipment (including specific identification of each Attachment to a City-owned, Company-installed, third-party structure located in the Public Way); (3) the route of fiber optic cable utilized by the Network; (4) the proposed type of construction materials for all structures, and (4) any other details that the City may reasonably request which are also applicable to other entities installing facilities in the Public Way.

7.3. Approval by City. Company shall not attach, install, maintain, or operate any Facilities in or on the Public Way until plans for such work have been approved by the City (which shall not be unreasonably withheld, delayed, conditioned or denied), and all necessary permits have been properly issued. Substantial modification to an installation plan (including, for example, a change of Node location) made in the course of construction shall require the written consent of the City, upon which the City shall act promptly, and may require modification of an existing or issuance of a new permit. Approval of plans and specifications and the issuance of any permits by the City shall not release Company from the responsibility for, or the correction of, any errors, omissions or other mistakes that may be contained in the plans, specifications and/or permits. Company shall be responsible for notifying the City and all other relevant parties immediately upon discovery of such omissions and/or errors and with obtaining any amendments for corrected City-approved permits, as may be necessary. The City shall use its best efforts to

promptly respond to a request for plan approval or modification within 60 days, and will cooperate with Company to facilitate the prompt processing and issuance of any required permits.

7.4. Maintenance of Facilities. Company shall, at its own expense, make and maintain its Attachment(s) and Equipment in safe condition and good repair, in accordance with all Applicable Standards. Notwithstanding anything in this Use Agreement to the contrary, Company shall not be required to update or upgrade its Attachments if they met Applicable Standards at the time they were made, unless such updates or upgrades are required by any revised Applicable Standards. Company shall use its commercially reasonable efforts to coordinate construction and maintenance of its Communications Facilities with the appropriate City agencies to minimize unnecessary disruption. Prior to commencing construction, installation or maintenance activities, Company shall acquire all required City permits.

7.5. Tagging.Company shall Tag all of its Attachments to Poles as specified by the City and/or applicable federal and state regulations, which will allow for ready identification of the type of Attachment and its owner. The City shall be responsible for periodically inspecting its Attachments to ensure they are tagged with approved permanent identification markers.

7.6. Interference. Company shall not allow its Communications Facilities to impair the ability of the City or the City's agent to use Poles or other Municipal Facilities, nor shall Company's Communications Facilities cause any radio frequency interference to the operation or function of any City radio communications facilities on or in the vicinity of Poles or other Municipal Facilities.

7.7. Company is solely responsible for the radio frequency ("RF") emissions emitted by its Communications Facilities and associated equipment. Company is jointly responsible for ensuring RF exposure from its emissions, in combination with the emissions of all other contributing sources of RF emissions, is within the limits permitted under all applicable rules of the FCC. To the extent required by FCC rules, Company shall install appropriate signage to notify workers and third parties of the potential for exposure to RF emissions.

7.8. Protective Equipment. Company and its employees and contractors shall utilize and install adequate protective equipment to ensure the safety of people and facilities.

7.9. Cut-Off Switch. Company shall install an equipment power cut-off switch as directed by the City and consistent with Applicable Standards and the City specifications for every City Pole or to which Company has attached Communications Facilities. The City will specify instances where these power cut-off facilities and associated equipment need to be pad-mounted. In ordinary circumstances, the City's authorized field personnel will contact Company's designated point of contact to inform Company of the need for a temporary power shut-down. Upon receipt of the call, Company will power down its antenna remotely, which shall occur during normal business hours and with twenty-four (24) hours advance notice. In the event of an Emergency, the power down will be with such advance notice as may be practicable and, if circumstances warrant, employees and contractors of the City may accomplish the power-down by operation of the power disconnect switch without advance notice to Company and shall notify

the Company as soon as possible. In all such instances, once the work has been completed and the worker(s) have departed the exposure area, the party who accomplished the power-down shall restore power and inform the Company as soon as possible that power has been restored.

7.10. Maximum Permissible Exposure Report. Within ninety (90) days following the Effective Date of this Use Agreement, Company shall furnish the City a Report on Maximum Permissible Exposure (MPE) Evaluation regarding radio frequency emissions and maximum exposure for humans, as it relates to Company's Attachment(s). A copy of any MPE reports submitted to the FCC shall be given to the City within thirty (30) days of the FCC submission. Failure to provide the report or failure to comply, in a timely manner, with FCC standards for limiting human exposure to radio frequency emissions shall be an event of default.

7.12. Emergency Contact Information. Company shall provide emergency after-hours contact information to the City to ensure proper notification in case of an Emergency. Information will include 24/7 telephone and cell phone information, and a list of duty managers by district and escalation procedures.

7.12. Violation of Specifications. If Company's Attachments, or any part of them, are installed, used, or maintained in violation of this Use Agreement, and Company has not corrected the violation(s) within thirty (30) days from receipt of written notice of the violation(s) from the City, the provisions of Section 28 shall apply. When the City believes, however, that such violation(s) pose an Emergency, the City may perform such work and/or take such action as it deems necessary without first giving written notice to Company. As soon as practicable afterward, the City will advise Company of the work performed or the action taken. Company shall be responsible for all actual and documented costs incurred by the City in taking action pursuant to this Section. Company shall indemnify the City for any such work.

7.13. Restoration of City Service. The City's service restoration requirements shall take precedence over any and all work operations of Company on City-owned Poles.

8. PRIVATE AND REGULATORY COMPLIANCE.

8.1. Necessary Authorizations. Before Company occupies any poles or other property of another person, Company shall obtain from the appropriate public or private authority, or from any property owner or other appropriate person, any applicable, required authorization to construct, operate, or maintain its Communications Facilities on public or private property. The City retains the right to require evidence that appropriate authorization has been obtained before any Permit is issued to Company. Company's obligations under this Section 8.1 include, but are not limited to, its obligation to obtain and pay for all necessary approvals to occupy public/private rights-of-way and easements and all necessary licenses and authorizations to provide the Services that it provides over its Communications Facilities. Company shall defend, indemnify, and reimburse the City for all losses, costs, and expenses, including reasonable attorneys' fees, which the City may incur as a result of claims by governmental bodies, owners of private property, or other persons, that Company does not have sufficient rights or authority to attach Company's Communications Facilities on poles or other property or to provide particular services.

8.2. Lawful Purpose and Use. Company's Communications Facilities must at all times serve a lawful purpose, and the use of such Communications Facilities must comply with all applicable federal, state and local law.

8.3. Forfeiture of City's Rights. No Permit granted under this Use Agreement shall extend, or be deemed to extend, to any City-owned Poles or other Municipal Facilities, to the extent that Company's Attachment would result in a forfeiture of the City's rights. Any Permit that would result in forfeiture of the City's rights shall be deemed invalid as of the date that the City granted it and require the immediate removal of the Attachment. If Company does not remove its Communications Facilities in question within thirty (30) days of receiving written notice from the City, the City may at its option perform such removal at Company's expense. Notwithstanding the forgoing, Company shall have the right to contest any such forfeiture before any of its rights are terminated, provided that Company shall indemnify the City for liability, costs, and expenses, including reasonable attorneys' fees that may accrue during Company's challenge.

8.4. Effect of Consent to Construction/Maintenance. Consent by the City to the construction or maintenance of any Attachments by Company shall not be deemed consent, authorization, or acknowledgment that Company has obtained all required Authorizations with respect to such Attachment.

9. PERMIT APPLICATION PROCEDURES.

9.1. Submission and Review of Permit Application. Before making any Attachment to a Pole or modifications to any existing Attachment, Company shall submit a properly executed Permit Application, which shall include a Pre-Construction Survey and detailed plans for the proposed Attachment or modification, including a description of any necessary Make-Ready Work to accommodate the Attachment or modification and a proposed schedule for completion, certified by a licensed professional engineer, and along with any required fees and/or bonds. Before performing any work in any Public Way, Company shall submit a properly executed Permit Application for that purpose, along with any required fees and/or bonds. The City's acceptance of the submitted design documents or the issuance of the Permit does not relieve Company of full responsibility for any errors and/or omissions in the engineering analysis. The City shall review and respond to such properly executed and complete Permit Application for routine installations as promptly as is reasonable, with a goal of providing a response during normal circumstances within sixty (60) days of receipt.

9.2. Modifications. Notwithstanding the requirements of 9.1, and except for Right-of-Way Permits, modifications shall not be subject to the additional permitting to the extent that: (i) such modification to the Attachment involves only substitution of internal components, and does not result in any change to the external appearance, dimensions, or weight of the Attachment, as approved by the City; or (ii) such modification involves replacement of the attachment with an Attachment that is the same, or smaller in weight and dimensions of the previously approved Attachment. As part of the Permit Application for a modification, Company shall furnish the City a Report on Maximum Permissible Exposure (MPE) Evaluation regarding radio frequency

emissions and maximum exposure for humans, as it relates to the Attachments proposed for modification.

9.3. Professional Certification. Prior to installing any new Attachment, or modifying any existing Attachment in a manner resulting in additional weight or volume being placed on a Pole, and unless otherwise waived in writing by the City, as part of the Permit Application process and at Company's sole expense, a qualified and experienced professional engineer must participate in the Pre-Construction Survey, conduct the Post-Construction Inspection, and certify that Company's Communications Facilities can be and were installed on the identified Poles in compliance with the Applicable Standards and in accordance with the Permit. The City may require Company's professional engineer to conduct a post- construction inspection that the City will verify by means that it deems to be reasonable.

9.4. Permit as Authorization to Attach. Upon completion and inspection of any necessary Make-Ready Work, City will issue the Permit, which shall serve as authorization for Company to make its Attachment(s).

9.5. Notification to City. Within thirty (30) days of completing the installation of an Attachment, Company shall provide written notice to the City.

9.6. Appearance.Company shall cooperate with the City on all issues of aesthetics and appearance and shall obtain design and location approval from the Planning Department for all attachments that are subject to this Use Agreement. Company shall follow all legally binding City regulations, policies and state and local ordinances with respect to aesthetics and appearance for the duration of the Use Agreement.

10. MAKE-READY WORK AND INSTALLATION.

10.1. Who May Perform Make-Ready Work. For Attachments to City-owned Poles, the City may give Company the option of either having Company perform any necessary Make-Ready Work through the use of qualified contractors authorized by the City, or having the City perform any necessary Make-Ready Work at Company's cost.

10.2. Payment for Make-Ready Work. Upon completion of the Make-Ready Work performed by the City at the request of Company pursuant to Section 10.1 above, the City may invoice Company for the City's actual and documented cost of such Make-Ready Work.

10.3. Company's Installation/Removal/Maintenance Work. All of Company's installation, removal, and maintenance work, by either Company's employees or authorized contractors, shall be performed at Company's sole cost and expense, in a good and workmanlike manner, and must not adversely affect the structural integrity of Poles or other Attaching Entity's facilities or equipment. All of Company's installation, removal, and maintenance work, either by its employees or authorized contractors, shall comply with all Applicable Standards, which shall include obtaining the necessary Permits prior to engaging in work to remove Communication Facilities. Company shall assure that any person installing, maintaining, or removing its Communications Facilities is fully qualified and familiar with all Applicable Standards.

11. POST CONSTRUCTION INSPECTIONS BY CITY AND MAINTENANCE.

11.1. At any time, the City or its contractors may perform a post-installation inspection of each Attachment made to the Poles. Periodic inspections with regard to ongoing conditions shall be addressed as set forth under Article 17.

11.2. If the City elects to not perform any post-installation inspection, such non-inspection shall not be grounds for any liability being imposed on the City or a waiver of any liability of Company.

11.3. If the post-installation inspection reveals that Company's facilities have been installed in violation of Applicable Standards or the approved design described in the Application, the City will notify Company in writing, and Company shall have thirty (30) days from the date of receipt of such notice to correct such violation(s), or such other period as the parties may agree upon in writing, unless such violation creates an Emergency in which case Company shall make all reasonable efforts to correct such violation immediately. The City may perform subsequent post-installation inspections within thirty (30) days of receiving notice that the correction has been made as necessary to ensure Company's Attachments have been brought into compliance.

11.4. If Company's Attachments remain out of compliance with Applicable Standards or approved design after any subsequent inspection, consistent with Article 17, the City will provide notice of the continuing violation and Company will have thirty (30) days from receipt of such notice to correct the violation; otherwise the provisions of Article 18 shall apply.

11.5 Company shall keep its Equipment free of debris and anything of a dangerous, noxious or offensive nature or which would create a hazard or undue vibration, heat, noise or interference. If the City gives Company written notice of a failure by Company to maintain its Equipment, Company shall use its best efforts to remedy such failure within forty-eight (48) hours after receipt of such written notice.

11.6. Company will be given reasonable access to each of its Equipment in the Public Way for the purpose of routine maintenance, repair, or removal of its Equipment. If any such maintenance activities have the potential to result in an interruption of any City services at the affected Municipal Facility, Company shall provide the City with a minimum of three (3) days prior written notice of such maintenance activities. Such maintenance activities shall, to the extent feasible, be done with minimal impairment, interruption, or interference to City services.

11.7. Company shall be responsible for any damage, ordinary wear and tear excepted, to street pavement, Municipal Facilities, existing facilities and utilities, curbs, gutters, sidewalks, landscaping, and all other public or private facilities, to the extent caused by Company's construction, installation, maintenance, access, use, repair, replacement, relocation, or removal of its Equipment in the Public Way. Company shall promptly repair such damage and return the Public Way and any affected Municipal Facilities and adjacent property to a safe and satisfactory condition to the City in accordance with the City's applicable street and Municipal Facilities

restoration standards or to the property owner if not the City. Company's obligations under this Section 11.7 shall survive for one (1) year past the completion of such reparation and restoration work.

11.8. Company shall at all times keep and maintain its Equipment free of all graffiti located thereon. The City shall notify Company in writing if graffiti is located on any Equipment. Thirty (30) days after notice in writing is received by Company, the City shall have the right to abate any graffiti present on any Equipment, and Company shall reimburse the City all costs directly attributable to graffiti abatement of Facilities which are incurred by City within thirty (30) days of the City's presenting Company with a statement of such costs.

12. NEW POLES; POLE REPLACEMENT.

12.1. New Poles.Company shall not erect poles, conduits, or other Equipment in a Public Way without all necessary permits and authorizations and the express permission of the City. In the event the construction of one or more New Poles is necessary to execute Company's planned installation of Communications Facilities, Company may request City approval to construct, at Company's sole expense, New Poles that will comply with Right-of-Way regulations and Applicable Standards. Any New Poles constructed by Company shall comport with the character, height and dimensions of existing poles in the area. The City shall consider any request to construct a New Pole in a nondiscriminatory manner and shall accommodate Company's request to the same or substantially similar extent as the City accommodates such requests from other providers of communications services within the City. Upon completion of construction, inspection and acceptance of New Poles, the New Poles shall be conveyed to City ownership.Upon any such conveyance to the City, Company shall not be subject to the Annual Fee under Section 3.1.

12.2. City Use of New Poles. The City may use any New Poles for City purposes, including but not limited to streetlights and other lighting so long as such use does not interfere with Company's present or future use of its Network or Equipment. The City shall be responsible for maintenance of any New Poles; however, the City shall charge to Company any and all maintenance costs and expensesrelated to Company’s Facilities and Equipment on said Poles.

13. EFFECT OF FAIL URE TO EXERCISE ACCESS RIGHTS.

If Company does not exercise any access right granted pursuant to an applicable Permit(s) for a City-owned Pole within one hundred twenty (120) calendar days of the Effective Date of such right (unless such time period is extended), the City may, but shall have no obligation to, use the space scheduled for Company's Attachment(s) for its own needs or make the space available to other Attaching Entities in accordance with the pole allocation priority set forth in Appendix A. For purposes of this Section, Company's access rights shall not be deemed effective until a Permit to attach has been issued.

14. REARRANGEMENTS AND TRANSFERS.

14.1. Required Transfers of Company's Communications Facilities. If the City reasonably determines that a rearrangement or transfer of Company's Attachments on a City-

owned Pole is necessary, the City will require Company to perform such rearrangement or transfer within thirty (30) days after receiving notice from the City. If Company fails to rearrange or transfer its Attachment within thirty (30) days after receiving such notice from City, the provisions of Article 18 shall apply, including the City's right to rearrange or transfer Company's Attachments sixty (60) days after Company's receipt of original notification of the need to rearrange or transfer its facilities. City shall not be liable for damage to Company's facilities except to the extent provided in Article 18. In an Emergency, the City may rearrange or transfer Company's Attachments on City-owned Poles as it determines to be necessary in its reasonable judgment. In an Emergency, the City shall provide such advance notice as is practical, given the urgency of the particular situation. The City shall then provide written notice of any such actions taken within ten (10) days following the occurrence.

14.2. Allocation of Costs. The costs for any rearrangement or transfer of Company's Communications Facilities or the replacement of a Pole in accordance with this Section, shall be allocated to the City and/or Company on the following basis:

14.2.1. If the City intends to modify or replace a City-owned Pole solely for its own requirements, it shall be responsible for the costs related to the modification/replacement of the Pole. Company costs related to rearrangement or transfer of Company's Communications Facilities as a result of modification or replacement of a City-owned Pole by the City shall be the responsibility of Company.

14.2.2. If the modification or replacement of a City-owned Pole is necessitated by the requirements of Company, Company shall be responsible for all costs caused by the modification or replacement of the Pole.

14.2.3. If the modification or the replacement of a City-owned Pole is the result of an Attaching Entity other than City or Company, the Attaching Entity requesting the additional or modified Attachment shall bear the entire cost of the modification or replacement, as well as the costs for rearranging or transferring Company's Communications Facilities. Company shall cooperate with such third-party Attaching Entity to determine the costs of moving Company's facilities.

14.2.4. If the City-owned Pole must be modified or replaced for reasons unrelated to the use of the Pole by either City, or Company or another Attaching Entity (e.g., storm, accident, deterioration), the City shall pay the costs of such modification or replacement, and Company shall pay the costs of rearranging or transferring its Communications Facilities.

14.3. City Not Required to Replace. Nothing in this Use Agreement shall be construed to require the City to replace any Pole for the benefit of Company.

15. POLE REPLACEMENTS.

15.1. Where Company is unable to place an Attachment on a City-owned Pole because such Pole is no longer serviceable due to decay, damage, deterioration, or in any other way not suitable for Attachment (a "Defective Pole"), as determined solely by the City in its discretion, Company may, at its option, arrange for the repair or replacement of such Defective Pole, at Company's sole cost and upon City's prior written approval. If Company opts not to repair or replace a Defective Pole, the City shall repair or replace the Defective Pole at its cost consistent with its routine maintenance schedule, and no Attachment shall be permitted until the Defective Pole is no longer defective. If a Defective Pole poses an imminent Emergency in the absence of any Attachment to it, City shall repair or replace said Pole at its sole cost, consistent with its normal procedures for Emergency repair and replacement.

15.2 In all instances, a Defective Pole replaced by Company as set forth in Section 15.1 will remain the property of the City.

16. ABANDONMENT OR REMOVAL OF POLES

If the City desires at any time to abandon or remove any City-owned Poles to which Company's Communications Facilities are attached, it shall give Company notice in writing to that effect at least sixty (60) calendar days prior to the date on which it intends to abandon or remove such Poles. Notice may be limited to thirty (30) calendar days if the City is required to remove or abandon a Pole as the result of the action of a third party or public necessity, and the lengthier notice period is not practical. If, following the expiration of the 30-day period, Company has not yet removed and/or transferred all of its Communications Facilities, the City shall have the right, but not the obligation, to remove or transfer Company's Communications Facilities at Company's expense and Company shall be subject to the provisions of Article 18. The City shall give Company prior written notice of any such removal or transfer of Company's Facilities.

17. INSPECTION.

17.1. General Inspections. The City reserves the right to make periodic inspections, as conditions may warrant, of Company's Attachments and Equipment. Such inspections, or the failure to make such inspections, shall not operate to relieve Company of any responsibility or obligation or liability assumed under this Use Agreement. Post Construction inspections concerning the compliance of Company's installation shall be addressed as set forth in Article 11.

17.2. Periodic Safety Inspections by the City. The City may at its option perform a safety inspection in all or in part of the territory covered by this Use Agreement with all Attaching Entities to identify any safety violations of all Attachments and facilities on Poles or other Municipal Facilities ("Safety Inspection"). Such notice shall describe the scope of the inspection and provide Company and all Attaching Entities an opportunity to participate. Company shall promptly assist and reasonably cooperate with City in the conduct of any Safety Inspection.

17.3. Periodic Inspection by Company. No less than every five (5) years during the term of this Use Agreement, Company shall conduct a safety and structural integrity survey of the Attachment(s), Equipment and Poles upon which they are located, which shall be certified by

a professional engineer. Company shall provide a written copy of the results of the survey to the City promptly thereafter, highlighting, as appropriate to bring to the City's attention, any Poles, Attachments or Equipment presenting a potential structural or public safety issue.

17.4. Corrections. In the event any of Company's Communications Facilities are found to be in violation of the Applicable Standards and such violation poses a potential Emergency, Company shall use all reasonable efforts to correct such violation immediately. Should Company fail or be unable to correct such Emergency immediately, the City may correct the Emergency and bill Company for one hundred twenty-five percent (125%) of the actual and documented costs incurred. If any of Company's Equipment is found to be in violation of the Applicable Standards and such violations do not pose a potential Emergency, the City shall, consistent with Article 18, give Company notice, whereupon Company shall have thirty (30) days from receipt of notice to correct any such violation, or within a longer, mutually agreed-to time frame if correction of the violation is not possible within thirty (30) days, such extended time to be not more than an additional sixty (60) days.

17.4.1. If any Municipal Facilities are found to be in violation of the Applicable Standards and specifications and the City has caused the violation, then the parties will work together to minimize the cost of correcting any such deficiencies, but the City shall be responsible for the full cost of any necessary or appropriate corrective measures, including removal and replacement of the Pole.

18. FAILURE TO REARRANGE, TRANSFER OR CORRECT.

18.1. Unless otherwise agreed, as part of written notice by the City of a need for Company to rearrange, transfer, remove or correct violations, the City will indicate whether or not the City is willing to perform the required work.

18.2. If the City indicates in the notice that it is willing to perform the work, Company shall have fifteen (15) days to notify the City in writing of its election to either have City perform the work or that the Company will perform the work itself.

18.2.1 If Company requests that the City perform the work, Company shall reimburse the City for the actual and documented cost of such work.

18.2.2 If Company either fails to respond or indicates that it will perform the work itself, then until such work is complete and the City receives written notice of the completion of such work, Company shall be subject to such penalties as are specified in Gaithersburg City Code.

18.2.3 Notwithstanding Company's election under Section 18.2.2 to perform the required work itself, commencing on the thirtieth (30)

day after expiration of the time period for completion of the work specified in the Use Agreement and original notification, the City may perform the required work at Company's expense, or may delegate such authority to another Attaching Entity utilizing a qualified contractor.

18.2.4 If Company was required to perform work under this Article 18 and fails to perform such work within the specified timeframe, and the City performs such work, the City may charge Company an additional twenty-five percent (25%) of its actual and documented costs for completing such work

18.3. If the City indicates in the notice that it is unwilling or unable to perform the work, then until such work is completed and City receives written notice of the completion of such work, Company shall be subject to a penalty as specified in the Gaithersburg City Code.

18.4. Company shall provide written notification to the City upon completion of any of the required work and fines will continue to accrue until the City's receipt of such notice of completion.

19. ACTUAL INVENTORY.

19.1. At Company's sole cost, the City may at intervals of not more often than once every five (5) years perform an actual inventory of the Attachments of City Poles in all or in part of the territory covered by this Use Agreement, for the purpose of checking and verifying the number of City Poles on which Company has Attachments. Such field check shall be made jointly by both parties and shall be at the cost of Company, such costs to be actual and documented, unless City is also performing an inventory of any other Attaching Entity with Attachments, and then the actual and documented cost shall be shared proportionately among all such Attaching Entities based upon the number of Attachments.

19.2. Attachment Records. Notwithstanding the above inventory provisions of Section 19.1, (a) Company shall furnish to City annually an up-to-date electronic map depicting the locations of its Attachments, in a format specified by the City; and (b) the City may perform, at its cost, its own inventory of Attachments at any time.

20. UNAUTHORIZED ATTACHMENTS.

20.1. If during the term of this Use Agreement, the City discovers Unauthorized Attachments placed on Poles within the Public Way, the following fees may be assessed, and procedures will be followed:

20.2. The City shall provide specific written notice of each violation, and Company shall be given five (5) days from receipt of notice to contest an allegation that an Attachment is unauthorized (or that Company failed to timely provide notice).

20.3. Company shall pay the City retroactively, Fees for all Unauthorized Attachments. Company shall furnish to the City notarized documentation as evidence of date of install for determining retroactive Fees. In the event Company is unable to provide documentation, Company shall pay retroactive Fees for all Unauthorized Attachments for a period of five (5) years, or for the period commencing from the Effective Date of this Use Agreement, or from the date of the last inventory of Company's Attachments (whichever period is shortest), at the Fees in effect during such periods.

20.4. In addition to the retroactive Fees, Company shall be subject to the Unauthorized Attachment Penalty of$500.00 per day for each Unauthorized Attachment from the date of discovery until removal of the Attachment or appropriate permission for the Attachment is filed by Crown with the City in accordance with 20.5.

20.5. Unless an Unauthorized Attachment is removed by Company, Company shall submit a Permit Application in accordance with Articles 5 and 6 of this Use Agreement within five (5) days of receipt of notice from the City of any Unauthorized Attachment, or such longer time as mutually agreed to by the parties after an inventory.

20.6. The City Right to Remove. If Company fails to submit a Permit Application within five (5) days of receipt of notice from the City of any Unauthorized Attachment, or such longer time as mutually agreed to by the parties after an inventory, City shall have the absolute right to immediately remove any Unauthorized Attachments, and Company agrees to pay any and all actual documented costs incurred by the City with regard to such removal. Removed Company Equipment shall be held by the City for ninety (90) days, or as required under Applicable Law, during which time Company may claim Equipment. Following the claim period, City shall obtain outright ownership of Equipment and may use or dispose of it in any manner whatsoever, and Company relinquishes any legal or possessory claim to the Equipment.

20.7. No Ratification of Unauthorized Use. No act or failure to act by the City with regard to any Unauthorized Attachments shall be deemed as ratification of the unauthorized use. Unless the parties agree otherwise, a Permit for a previously Unauthorized Attachment shall not operate retroactively or constitute a waiver by the City of any of its rights or privileges under this Use Agreement or otherwise, and Company shall remain subject to all obligations and liabilities arising out of or relating to its unauthorized use.

21. INDEMNIFICATION AND WAIVER.

21.1. Liability. The City reserves to itself the right to maintain and operate its Poles in the manner that will best enable it to fulfill its public service, health and safety obligations. Company agrees that its use of the City's Poles is at Company's sole risk. Notwithstanding the foregoing, the City shall exercise reasonable precaution to avoid damaging Company's Communications Facilities and shall report to Company the occurrence of any such damage caused by the City's employees, agents or contractors.

21.2. Indemnification by Company. Company shall indemnify, defend and hold harmless the City, its elected/appointed officials, departments, employees, agents and representatives from any and all claims, demands, suits and actions, including attorneys' fees and court costs connected therewith, brought against the City, its elected/appointed officials, departments, employees, agents or representatives and arising as a result of any act or omission of Company, its agents, officers or employees, except for any and all claims, demands, suits and actions, including attorneys' fees and court costs connected therewith, brought against the City or the City's elected/appointed officials, departments, employees, agents and representatives, arising as a result of the sole and willful or grossly negligent act or omission of the City, its elected/appointed officials, departments, employees, agents or representatives.

22.3 Waiver of Claims. Company shall use any Municipal Facilities or the Public Way at its own risk and the City shall not be responsible for any damages thereof due to any cause. Neither the City nor any other user of Municipal Facilities or Public Way shall be liable to Company for any interruption of Company's services, including but not limited to the failure of Company's equipment to perform as intended, arising in any manner. Company waives any and all claims, demands, causes of action, and rights it may assert against the City on account of any loss, damage, or injury to any Equipment or any loss or degradation of the Services.

22.4 Waiver of Punitive and Consequential Damages. Both parties hereby waive the right to recover punitive and consequential damages from the other party; however, this provision does not apply to indemnify.

22. ENVIRONMENTAL.

22.1. Except in strict accordance with all applicable Laws and regulations, Company shall not at any time within the Public Way or on or near Municipal Facilities store, treat, transport or dispose of any hazardous substance, hazardous waste or oil ("Hazardous Substance") as defined by the Resource, Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901 et seq., Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 et seq., Maryland Environment Article Code Ann., Title 4, Sec. 4-401, et seq., and Maryland Environment Article Code Ann., Title 7, subtitle 2.

22.2. "Environmental Conditions" as used in this Use Agreement shall mean discovered or undiscovered contaminants, pollutants, or toxic substances affecting health or the environment, in any way arising from or related to the subject matter of this Use Agreement that could, or do, result in any damage, loss, cost or expense to, or liability, by the City to any person including a government agency or other entity. In addition to all other indemnifications contained herein, Company specifically agrees to indemnify, reimburse, defend and hold harmless the City, its elected/appointed officials, employees, agents and representatives ("Indemnified Parties") from and against any and all losses, costs, liabilities, including but not limited to liabilities, demands, obligations, claims, suits, actions and expenses, attorneys' fees, consultant fees and court costs connected therewith, brought against the Indemnified Parties, or incurred by any of them, by reason of injury to persons, including death, and damage to property arising out of Environmental Conditions or resulting from any acts or omissions of Company, its

contractors, agents, or employees arising from Environmental Conditions, unless solely caused by the negligent act of the City. Notwithstanding anything to the contrary herein, Company agrees to defend, indemnify and hold harmless the Indemnified Parties from and against all administrative and judicial actions and rulings, claims, causes of action, demands and liability including, but not limited to, damages, costs, expenses, assessments, penalties, fines, losses judgments and reasonable attorney fees that the Indemnified Parties may suffer or incur due to the existence of any Hazardous Substances in the Public Ways or on or near Municipal Facilities, or migration of any Hazardous Substance to other properties or the release of any Hazardous Substance into the environment, that arise from the activities of Company and/or its representatives on the Public Ways or on or near Municipal Facilities, or related to Company's Network or Communications Facilities. The indemnifications in this Section specifically include, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup remedial, removal or restoration work required by any governmental authority. This provision shall be in addition to, and separate from, any remedies available to the City for breach by Company of its obligations under any of the provisions of this Use Agreement and shall in no way limit any recourse that the City may have at the time against Company pursuant to any federal, state or local laws. The provisions of this Paragraph shall survive the termination or expiration of this Use Agreement.

22.3. Notwithstanding any other provision of this Use Agreement, neither party shall be liable to the other for any consequential, incidental, indirect, liquidated, or special damages or lost revenue or lost profits to any person arising out of this Use Agreement or the performance or nonperformance of any provision of this Use Agreement, even if such party has been informed of the possibility of such damages.

22.4. No provision of this Use Agreement is intended, or shall be construed, to be a waiver for any purpose by the City of any applicable state limits on municipal liability or governmental immunity. No indemnification provision contained in this Use Agreement under which Company indemnifies the City shall be construed in any way to limit any other indemnification provision contained in this Use Agreement.

22.5. The duties described in this Section shall survive termination of this Use Agreement.

22.6. Duty to Inspect. Company acknowledges and agrees that the City does not warrant the condition or safety of the City's Public Ways, Poles or other Municipal Facilities, or the premises surrounding those facilities, and Company further acknowledges and agrees that it has an obligation to inspect Municipal Facilities or premises surrounding Municipal Facilities, prior to commencing any work on Municipal Facilities or entering the premises surrounding such Municipal Facilities.

22.7. Knowledge of Work Conditions. By executing this Use Agreement, Company warrants that it has acquainted, or will fully acquaint, itself and its employees and/or contractors and agents with the conditions relating to the work that Company will undertake under this Use Agreement and that it fully understands or will acquaint itself with the facilities, difficulties, and restrictions attending the execution of such work.

22.8. Disclaimer. The City makes no express of implied warranties with regard to Poles or other Municipal Facilities, all of which are hereby disclaimed, and City makes no other express or implied warranties, except to the extent expressly and unambiguously set forth in this Use Agreement. The City expressly disclaims any implied warranties of merchantability or fitness for a particular purpose.

22.9. Damage to Municipal Facilities. If Company damages or interferes with the operation of any Municipal Facilities or equipment, Company shall, at its own expense, immediately do all things reasonable to avoid further injury or damages, direct and incidental, resulting therefrom and shall notify the City immediately.

23. INSURANCE.

23.1. Company shall obtain and maintain at all times during the term of this Use Agreement Commercial General Liability insurance and Commercial Automobile Liability insurance protecting Company in an amount not less than One Million Dollars ($1,000,000) per occurrence (combined single limit), including bodily injury and property damage, and with respect to the Commercial General Liability policy in an amount not less than Two Million Dollars ($2,000,000) annual aggregate for each personal injury liability and products- completed operations. The Commercial General Liability insurance policy shall name the City, its elected officials, officers, and employees as additional insureds as respects any covered liability arising out of Company's performance of work under this Use Agreement. Coverage shall be in an occurrence form and in accordance with the limits and provisions specified herein. Claims-made policies are not acceptable. Such insurance shall not be canceled, nor shall the occurrence or aggregate limits set forth above be reduced, until the City has received at least thirty (30) days' advance written notice of such cancellation or change. Company shall be responsible for notifying the City of such change or cancellation.

23.2. Filing of Certificates and Endorsements. Prior to the commencement of any work pursuant to this Use Agreement, Company shall file with the City the required original certificate(s) of insurance with endorsements, which shall state the following:

23.2.1. the policy number; name of insurance company; name and address of the agent or authorized representative; name and address of insured; project name; policy expiration date; and specific coverage amounts; that the City shall receive thirty (30) days' prior notice of cancellation except for nonpayment of premium;

23.2.2. that Company's Commercial General Liability insurance policy is primary as respects any other valid or collectible insurance that the City may possess, including any self-insured retentions the City may have; and any other insurance the City does possess shall be considered excess insurance only and shall not be required to contribute with this insurance; and

24.2.3. that Company's Commercial General Liability insurance policy waives any right of recovery the insurance company may have against the City.

24.3. The certificate(s) of insurance with notices shall be mailed to the City at the address specified in Section 24.

24.4. Workers' Compensation Insurance. Company shall obtain and maintain at all times during the term of this Use Agreement statutory workers' compensation and employer's liability insurance in an amount not less than One Million Dollars ($1,000,000) and shall furnish the City with a certificate showing proof of such coverage.

24.5. Insurer Criteria. Any insurance provider of Company shall be admitted and authorized to do business in the Commonwealth of Maryland and shall carry a minimum rating assigned by A.M. Best & Company's Key Rating Guide of "A" Overall and a Financial Size Category of "X" (i.e., a size of $500,000,000 to $750,000,000 based on capital, surplus, and conditional reserves). Insurance policies and certificates issued by non-admitted insurance companies are not acceptable.

24.6. Severability of Interest. Any deductibles or self-insured retentions must be stated on the certificate(s) of insurance, which shall be sent to and approved by the City. "Severability of interest" or "separation of insureds" clauses shall be made a part of the Commercial General Liability and Commercial Automobile Liability policies.

24. NOTICES.

24.1. All notices which shall or may be given pursuant to this Use Agreement shall be in writing and delivered personally or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; (b) by means of prepaid overnight delivery service; or (c) by facsimile or email transmission, if a hard copy of the same is followed by delivery through the U. S. mail or by overnight delivery service as just described, addressed as follows:

If to the City:
City Manager
City of Gaithersburg
31 S Summit Avenue
Gaithersburg, MD 20877

With a copy which shall not constitute legal notice to:
City Attorney
City of Gaithersburg
31 S Summit Avenue
Gaithersburg, MD 20877

_____
_____

With a copy which shall not constitute legal notice to:

_____
_____
_____
_____

25.2. Date of Notices; Changing Notice Address. Notices shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the mail, or the next business day in the case of facsimile, email, or overnight delivery. Either party may from time to time designate any other address for this purpose by written notice to the other party delivered in the manner set forth above.

25.3 The above notwithstanding, the parties may agree to utilize electronic communications such as email for notifications related to the Permits application and approval and construction process.

26. TERMINATION.

This Use Agreement may be terminated by either party upon forty five (45) days' prior written notice to the other party upon a default of any material covenant or term hereof by the other party, which default is not cured within forty-five (45) days of receipt of written notice of default (or, if such default is not curable within forty-five (45) days, if the defaulting party fails to commence such cure within forty-five (45) days or fails thereafter diligently to prosecute such cure to completion), provided that the grace period for any monetary default shall be ten (10) days from receipt of notice rather than forty-five (45) days. In addition to the remedies set forth in Article 28, the City shall have the right to terminate this Use Agreement (i) if the City is mandated by law, a court order or decision, or the federal or state government to take certain actions that will cause or require the removal of the Municipal Facilities or Company's Communications Facilities from the Public Way; (ii) if any of Company's Authorizations to operate the Network and/or provide Service is terminated, revoked, expired, or otherwise abandoned; or (iii) for the City's convenience. Except as expressly provided herein, the rights granted under this Use Agreement are irrevocable during the term.

27. ASSIGNMENT.

27.1. Limitations on Assignment.Company shall not assign its rights or obligations under this Use Agreement, nor any part of such rights or obligations, without the prior written consent of the City, which consent shall not be unreasonably withheld.

27.2. Notwithstanding the provisions of section 27 .1 above, Company may, during the term of this Use Agreement, assign or transfer this Use Agreement to (i) any Affiliate of Company or to a partnership of which at least fifty percent (50%) of the units are owned directly or indirectly by Company or its parent company; or (ii) any successor to Company's business, or

a substantial part thereof, whether through merger, amalgamation, consolidation or sale of assets (each, an "Assignee"), without the prior consent of the City; provided, however, any such assignment or transfer shall be subject to the following conditions:

27.2.1. In the case of a sale of assets, (i) the Company has assigned its state issued certificate of authority and/or other authorization issued by local franchising authorities to such Assignee, and such assignment has been approved (if applicable law requires approval), or the Assignee otherwise holds an applicable and effective Use Agreement; and (ii) the Assignee has received and accepted an assignment or transfer of the assets comprising the Company's business, or a substantial part thereof.

27.2.2. Notice of the assignment or transfer has been provided to the City, in writing, within sixty (60) days of the date an application for transfer or assignment of the certificate of authority and any applicable Use Agreement has been made, if such application for transfer or assignment is required by applicable law under the circumstances, or in the case of a sale of assets, within seven (7) business days after the assignment or transfer.

27.3. Obligations of Assignee/Transferee and Company. No assignment or transfer under this Article shall be allowed or enforceable with respect to the City until the Assignee or other transferee becomes a signatory to this Use Agreement and assumes all obligations of Company arising under this Use Agreement, whether arising before or after the date of the transfer or assignment. Company shall furnish the City with prior written notice of the transfer or assignment, together with the name and address of the transferee or Assignee. Notwithstanding any assignment or transfer, Company shall remain fully liable under this Use Agreement and shall not be released from performing any of the terms, covenants, or conditions of this Use Agreement without the express written consent to the release of Company by the City.

27.4. Sub-licensing. Without the City's prior written consent, Company shall not sub-license or lease its rights under this Use Agreement to any third party, including but not limited to, allowing third parties to place Attachments on Poles. Any such action shall constitute a material breach of this Use Agreement. The use of Company's Communications Facilities by third parties that involves no additional Attachment is not subject to this Article.

28. DEFAULT.

28.1. An Event of Default (each of the following being an "Event of Default") shall be deemed to have occurred hereunder by Company if:

28.1.1. Company shall breach any material term or condition of this Use Agreement; or

28.1.2. Company shall fail to perform, observe or meet any material covenant or condition made in this Us Agreement; or

28.1.3. At any time, any representation, warranty or statement made by Company herein shall be incorrect or misleading in any material respect.

28.2. Upon the occurrence of any one or more of the Events of Default set forth in Section 29.1 hereof, City, at its option, in addition to and not in lieu of any other remedies provided for herein, shall be entitled to proceed to exercise any and all actions it may have in law or at equity, including drawing down upon the bond for any fees, costs, expenses or penalties that Company has not paid, and in addition, at its option, the City may terminate this Use Agreement upon providing notice to Company, provided, however, the City may take such action or actions only after first giving Company written notice of the Event of Default and a reasonable time within which Company may cure or commence diligent efforts to cure such Event of Default, which period of time shall be not less than thirty (30) calendar days, except that the period of time shall not be less than ten (10) calendar days for any monetary amounts past due and owing by Company to the City, or for failure to maintain adequate insurance or bonds, as provided for herein.

28.3. Without limiting the rights granted to the City pursuant to the foregoing Section 28.2, the parties hereto agree to conduct themselves reasonably and in good faith and to use a good faith effort to meet and to resolve outstanding issues.

28.4. In the event that the City fails to perform, observe or meet any material covenant or condition made in this Use Agreement or shall breach any material term of condition of this Use Agreement, or at any time any representation, warranty or statement made by City shall be incorrect or misleading in any material respect, then City shall be in default of this Use Agreement. Upon being provided notice from Company of said default, the City shall have thirty (30) days to cure same and if such default is not cured, then Company shall have any and all remedies at law or in equity available to it, including termination of this Use Agreement without any liability therefor.

28.5. Upon Termination for Default, Company shall remove its Attachments from all Poles and other Municipal Facilities within six (6) months of receiving notice, or at a rate of ten percent (10%) of its Attachments per month, whichever period results in the greatest length of time for completing removal. Company shall restore the Poles and other Municipal Facilities and surrounding areas affected by its Communications Facilities to their prior condition at the commencement of this Use Agreement, reasonable wear and tear and agreed upon modifications to Poles, such as installation of Riser or internal conduits excepted. If not so removed within that time period, the City shall have the right to remove Company's Attachments and Communications Facilities, and Company agrees to pay the actual and documented cost thereof, within forty-five (45) days after it has received an invoice from the City.

29. RECEIVERSHIP, FORECLOSURE OR ACT OF BANKRUPTCY.

The Right of Way Use Agreement use granted hereunder to Company shall, at the option of the City, cease and terminate one hundred twenty (120) days after the filing of bankruptcy or the appointment of a receiver or receivers or trustee or trustees to take over and conduct the business

of Company, whether in a receivership, reorganization, bankruptcy or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred twenty (120) days, or unless such receivers or trustees shall have, within one hundred twenty (120) days after their election or appointment, fully complied with all the terms and provisions of this Use Agreement granted pursuant hereto, and the receivers or trustees within said one hundred twenty (120) days shall have remedied all Events of Default under this Use Agreement.

29.1. In the case of foreclosure or other judicial sale of the plant, property and equipment of Company, or any part thereof, including or excluding this Use Agreement, the City may serve notice of termination upon Company and the successful bidder at such sale, in which event this Use Agreement herein granted and all rights and privileges of this Use Agreement hereunder shall cease and terminate thirty (30) days after service of such notice, unless:

29.1.1. The City shall have approved the transfer of this Use Agreement to the successful bidder, as and in the manner in this Use Agreement provided; and

29.1.2. Such successful bidder shall have covenanted and agreed with the City to assume and be bound by all the terms and conditions to this Use Agreement.

30. REMOVAL OF ATTACHMENTS.

30.1. Company may at any time remove its Attachments from any Municipal Facility, but shall promptly give City written notice of such removals and obtain all necessary Permits. No refund of any rental fee will be due on account of such removal. Company shall restore the Poles, Municipal Facilities, and surrounding areas affected by its Communications Facilities to their prior condition at the commencement of this Use Agreement, reasonable wear and tear and agreed upon modifications to Poles and Municipal Facilities, such as installation of Riser or internal conduits excepted.

30.2. Removal Due to Termination or Abandonment. Following the termination of this Use Agreement for any reason, or in the event Company ceases to operate and abandons the Network, Company shall, within one hundred twenty (120) days, at its sole cost and expense, remove all Communications Facilities from the Public Way and restore the area affected by its communications Facilities to its condition at the commencement of this Use Agreement, reasonable wear and tear excepted, and further excepting landscaping and related irrigation equipment, or other aesthetic improvements made by Company to the Public Way or the adjacent property, or as otherwise required by the City. Within 90 days of a written request from the City, Company will post a payment bond in the amount of $500,000.00 to address the City's cost of removing any Communications Facilities not removed by Company within one hundred twenty (120) days of termination, and as compensation for any damage to the Public Way relating to the Communications Facilities, reasonable wear and tear excepted. Alternatively, the City may allow Company, in the City's sole and absolute discretion, to abandon the Network, or any part thereof, in place and convey it to the City.

31. REQUIRED REPORTS.

31.1. Annual Construction Report. Not later than the fifteenth (15th) day after the close of each calendar year in which any work was performed in the Public Way by Company, Company shall provide the City with the following:

31.1.1 An updated "as-built" map clearly indicating each Node, pad-mounted Facility, control box, and associated fiber network route in the Public Way, which shall specifically identify Attachments to City-owned structures or structures owned by a third party located in the Public Way, specifying owner of underlying facility (i.e., City, Pepco);

31.1.2. A construction plan specifically describing, through maps, illustrations, diagrams, construction drawings and written description, construction or other significant work planned (substantially in the form of an installation plan described Section 6.2) relating to Communications Facilities for the current calendar year and the following calendar year; and

31.1.3. A cumulative written list of the Permits that the Company has received from the City through the last day of the preceding calendar year. The report shall list the type of Permit, the location(s) of the work being performed under the Permit, the date the work started or is projected to start, and the date the work stopped or is projected to stop. Company shall omit a Permit from this list after such permit has expired and has not been renewed for three (3) consecutive months.

32. PERFORMANCE BOND.

Company shall furnish a performance bond executed by a surety company reasonably acceptable to the City which is duly authorized to do business in the state of Maryland in the amount of fifty thousand dollars ($50,000.00) for the duration of this Use Agreement as security for the faithful performance of this Use Agreement and for the payment of all persons performing labor and furnishing materials in connection with this Use Agreement.

33. MISCELLANEOUS PROVISIONS.

The provisions which follow shall apply generally to the obligations of the parties under this Use Agreement.

33.1. Nonexclusive Use.Company understands that this Use Agreement does not provide Company with exclusive use of the Public Way or any Municipal Facility and that the City shall have the right to permit other providers of communications services to install equipment or devices in the Public Way and/or on Municipal Facilities.

33.2. Waiver of Breach. The waiver by either party of any breach or violation of any provision of this Use Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other provision of this Use Agreement.

33.3. Contacting Company.Company shall be available to the staff employees of any City department having jurisdiction over Company's activities twenty-four (24) hours a day, seven (7) days a week, regarding problems or complaints resulting from the attachment, installation, operation, maintenance, or removal of the Equipment. The City may contact _____at telephone number _____ regarding such problems or complaints.

33.4. Governing Law; Jurisdiction. This Use Agreement shall be governed and construed by and in accordance with the laws of the State of Maryland, without reference to its conflicts of law principles. If suit is brought by a party to this Use Agreement, the parties agree that trial of such action shall be vested in the state courts of Maryland, in the County in which the City is located. However, in the event of a suit with claims arising under either: the federal Communications Act of 1934, as amended, or Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (the Spectrum Act), or any federal law, present or future, that governs wireless telecommunications, the parties agree that trial of such action may be brought in either state or federal court of competent jurisdiction and venue in Maryland.

32.5. Consent Criteria. In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Use Agreement, such party shall not unreasonably delay, condition, or withhold its approval or consent.

32.6. Representations and Warranties. Each of the parties to this Use Agreement represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform that Party's respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other person or entity in connection herewith, except as provided in § 4.2 above.

33.7 Amendment of Use Agreement. This Use Agreement may not be amended except pursuant to a written instrument signed by both parties.

33.8. Entire Agreement. This Use Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Use Agreement which are not fully expressed herein.

ATTEST:

_____

COMPANY

_____

ATTEST:

MAYOR & CITY COUNCIL OF GAITHERSBURG

_____

_____

Approved as to form and legal sufficiency
this _____ day of _____, 2017.

_____
Lynn Board, City Attorney

Outside Correspondence

Distributed to M&CC:5/22/17
Gang Violence

From: Britta Monaco
Sent: Tuesday, May 16, 2017 1:54 PM
To: Jackie Muchella
Cc: Doris Stokes; Tony Tomasello; Mark Sroka
Subject: RE: Gang Violence in Gaithersburg.

Ms. Muchella, thank you for contacting the City of Gaithersburg regarding your concerns with violence in the Olde Towne area. Your e-mail is being shared with our elected officials and is also being shared with our Chief of Police and City Manager for their consideration.

Britta Monaco
Director, Department of Community & Public Relations
City of Gaithersburg | 31 S. Summit Ave. | Gaithersburg, MD 20877
240-805-1126
britta.monaco@gaithersburgmd.gov

From: Jackie Muchella
Sent: Tuesday, May 16, 2017 7:34 AM
To: cityhall@gaithersburgmd.gov
Subject: Gun Violence in Gaithersburg.

Jaquelina Muchella
8124 Chelaberry Ct.
Gaithersburg, Maryland 20879
Jackiejaime4@hotmail.com

The Honorable Jud Ashman
City Hall
31 South Summit Avenue
Gaithersburg, Maryland 20877

Dear Mayor Jud Ashman

I lived in Gaithersburg and I am very concerned about the recent increase of Gang violence in the area. I have noticed an increase especially in Old Town, close to Gaithersburg High School, and I am concerned that the violence will spread into my neighborhood. I think more police services around the town may help to prevent this problem. I hope you will be able to provide additional police services in time to protect our schools and neighborhoods.
Thank you in advance and I hope you will be able to help us in this matter.

Sincerely,

Jaquelina Muchella

Distributed to M&CC:5/22/17
Committee Interest

From: Geoff Trotter [mailto:geoff.trotter@gmail.com]
Sent: Wednesday, May 17, 2017 8:58 AM
To: CityHall External Mail
Subject: Board/Committee Vacancies

Mayor Ashman and Council Members,

In looking at the vacancies available on the City of Gaithersburg website, I see that several committees are populated well below the established number of positions, and I would like to offer my services for at least one of these positions. While I do not see a particular committee, board, or commission that perfectly meshes with my background, I believe that I can contribute to almost any of these community groups.

After living and growing up in Gaithersburg from elementary school through high school, I went to college across the country to a small engineering school outside of Los Angeles. Since graduating, I have lived in various places around the DC Metro area, but eventually my family and I came home to Gaithersburg in 2010. Now, I would like to help shape my community in some way beyond coaching youth volleyball and baseball.

Specifically, I would like to be considered for a vacant position on the Transportation Committee. If there are no restrictions against serving on multiple committees, I may volunteer to serve on additional committees with vacancies, such as the Educational Enrichment Committee or the Community Advisory Committee. However, initially, I believe the Transportation Committee would be the best fit for me.

Please find my resume attached, and if you have any questions for me, feel free to contact me by email (geoff.trotter@gmail.com) or by phone (240-672-2496). Thank you for your consideration.

Sincerely,
Geoff Trotter

Adjournment

EXHIBIT D

Photo 5 – Facing north along access away from *Subject Site*

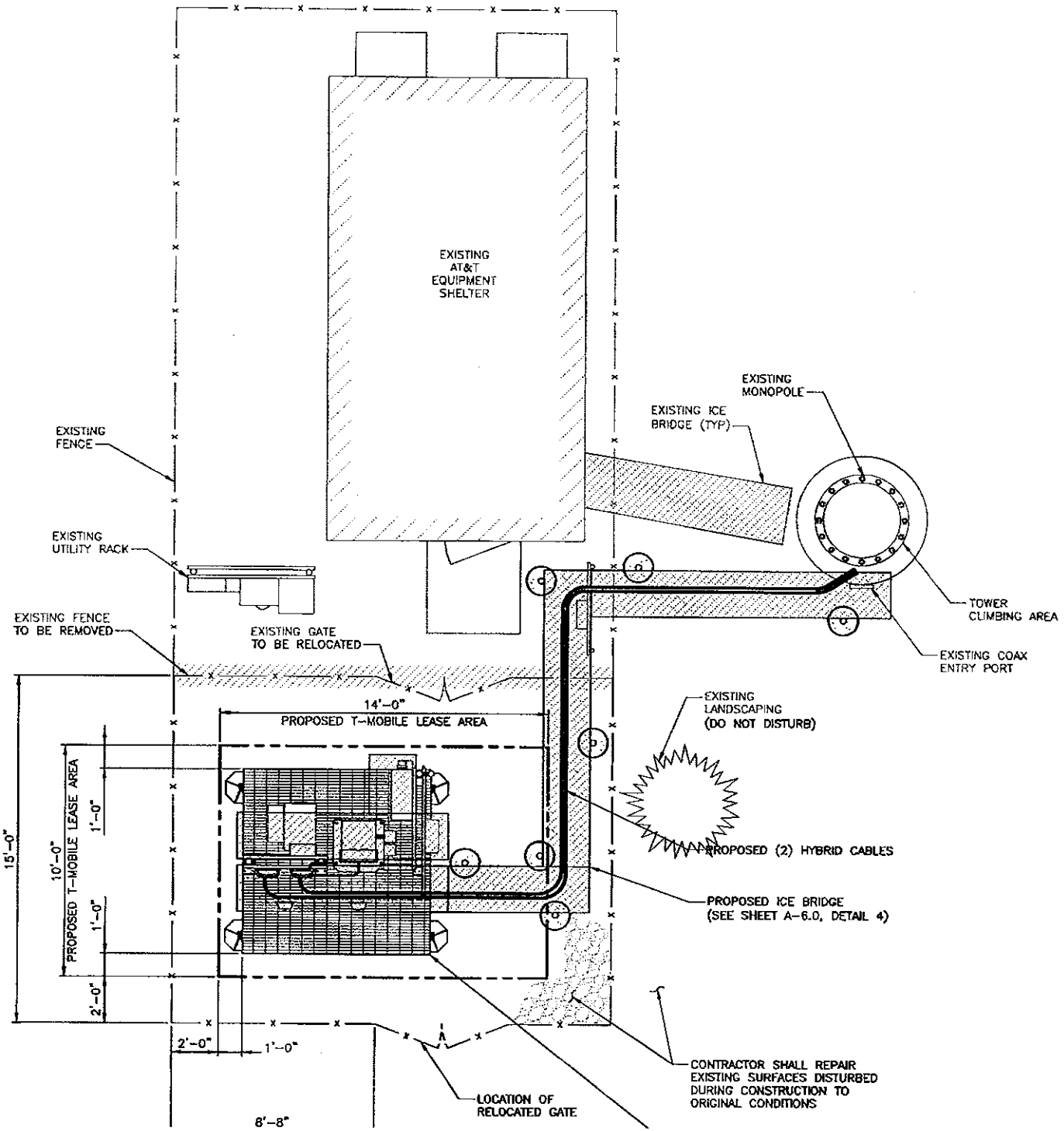
Photo 6 – Facing north overlooking *Subject Site*

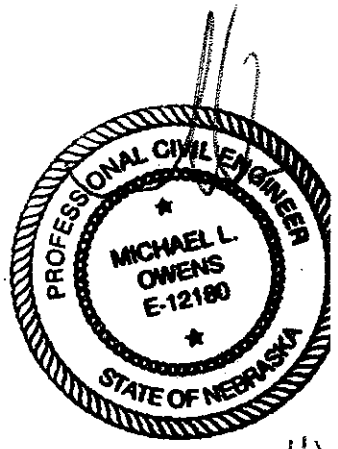
Photo 7 – Facing south overlooking *Subject Site*

Photo 8 – Facing east overlooking *Subject Site*

Photo 9 – Facing west overlooking *Subject Site*

Photo 10 – Facing north from *Subject Site*


EXISTING AT&T EQUIPMENT SHELTER
EXISTING MONOPOLE
EXISTING ICE BRIDGE (TYP)
EXISTING FENCE
EXISTING UTILITY RACK
EXISTING FENCE TO BE REMOVED
EXISTING GATE TO BE RELOCATED
TOWER CLIMBING AREA
EXISTING COAX ENTRY PORT
14'-0"
PROPOSED T-MOBILE LEASE AREA
EXISTING LANDSCAPING (DO NOT DISTURB)
15'-0"
10'-0"
PROPOSED T-MOBILE LEASE AREA
1'-0"
1'-0"
2'-0"
PROPOSED (2) HYBRID CABLES
PROPOSED ICE BRIDGE (SEE SHEET A-6.0, DETAIL 4)
2'-0"
1'-0"
CONTRACTOR SHALL REPAIR EXISTING SURFACES DISTURBED DURING CONSTRUCTION TO ORIGINAL CONDITIONS
LOCATION OF RELOCATED GATE
8'-8"


PROFESSIONAL CIVIL ENGINEER
MICHAEL L. OWENS
E-12180
STATE OF NEBRASKA

5/7/11

EXHIBIT E

Summary of Tribal Correspondence
TCNS Number 146059

Submittal Date: 11/08/2016
Notification Date: 11/10/2016

Tribal Entity/NHO	30-day Tribe	Contact Summary	FCC Referral Date	Clearance Date
Spirit Lake Nation	No	11/9/2016 - Fee and docs requested 1/5/2016 - Docs submitted 1/10/2017 - Fee submitted 1/10/2017 - Cleared	N/A	1/12/2017
Crow Creek Sioux Tribe	No	1/12/2017 - Fee submitted 2/13/2017 - Emailed and left phone message 2/16/2017 - Emailed 2/21/2017 - Emailed 2/23/2017 - Fees and docs requested 2/28/2017 - Emailed and left phone message 3/2/2017 - Emailed and left phone message 3/7/2017 - Emailed and left phone message 3/14/2017 - Emailed and left phone message 3/17/2017 - Escalated to FCC 3/23/2017 - Emailed and left phone message 4/3/2017 - Cleared	N/A	4/3/2017
Lower Brule Sioux Tribe	No	1/5/2016 - Docs submitted 2/13/2017 - Left phone message 2/15/2017 - Cleared	N/A	2/15/2017
Yankton Sioux Tribe	No	1/5/2016 - Docs submitted 1/10/2016 - Fee submitted 2/13/2017 - Left phone message 2/13/2017 - Emailed 2/21/2017 - Emailed 2/28/2017 - Left phone message 3/2/2017 - Left phone message 3/7/2017 - Emailed and left phone message 3/14/2017 - Emailed and left phone message 3/14/2017 - Cleared	N/A	3/14/2017
Sisseton-Wahpeton Oyate of the Lake Traverse Reservation	No	11/9/2016 - Fee and docs requested 1/5/2016 - Docs submitted 1/12/2017 - Fee submitted 2/13/2016 - Emailed and left phone message 2/15/2017 - Cleared	N/A	2/15/2017
Flandreau Santee Sioux Tribe	No	11/10/2016 - Fees and docs requested 1/10/2017 - Docs submitted 1/12/2017 - Fee submitted 1/20/2017 - Cleared	N/A	1/20/2017
Ponca Tribe of Nebraska	No	1/12/2017 - Fee submitted 1/19/2017 - Cleared	N/A	1/19/2017
Omaha Tribe of Nebraska	No	11/17/2016 - Fees and docs requested 1/12/2017 - Fee and docs submitted 1/18/2017 - Cleared	N/A	1/18/2017
Santee Sioux Nation	No	1/12/2017 - Fee submitted 1/23/2017 - Cleared	N/A	1/23/2017
Winnebago Tribe of Nebraska	No	11/22/2016 - Cleared 1/12/2017 - Fee submitted	N/A	11/22/2016

Tribal Entity/NHO	30-day Tribe	Contact Summary	FCC Referral Date	Clearance Date
Pawnee Nation	No	11/10/2016 - Fee and docs requested 1/12/2017 - Fee and docs submitted 1/24/2017 - Cleared	N/A	1/24/2017
Kiowa Indian Tribe of Oklahoma	No	1/12/2017 - Fee and docs submitted 1/24/2017 - Cleared	N/A	1/24/2017
Iowa Tribe of Kansas & Nebraska	No	1/12/2017 - Fee and docs submitted 2/13/2017 - Emailed and left phone message 2/13/2017 - Clearance	N/A	2/13/2017
Kaw Nation	No	1/12/2017 - Fee and docs submitted 1/17/2017 - Cleared	N/A	1/17/2017
Otoe-Missouria Tribe of Indians	No	11/10/2016 - Fee and docs requested 1/10/2017 - Docs submitted 1/12/2017 - Fee submitted 1/19/2017 - Cleared	N/A	1/19/2017
Ponca Tribe of Indians of Oklahoma	No	12/2/2016 - Fee and docs requested 1/10/2017 - Docs submitted 1/12/2017 - Fee submitted 2/13/2017 - Emailed and left phone message 2/16/2017 - 2nd noticed 2/21/2017 - Emailed 2/27/2017 - Cleared	N/A	2/27/2017
Crow Tribe	No	12/20/2016 - Cleared, based on phone call with Emerson Bull Chief 1/10/2017 - Docs submitted 1/12/2017 - Fee submitted	N/A	12/20/2016
Fort Peck Tribes	No	1/5/2017 - Docs submitted 2/6/2017 - 2nd noticed 2/13/2017 - Emailed and left phone message 1/31/2017 - Cleared	N/A	1/31/2017
Eastern Shoshone Tribe	No	11/10/2016 - Fee and docs requested 1/10/2017 - Docs submitted 1/12/2017 - Fee submitted 2/13/2017 - Emailed 2/14/2017 - Cleared	N/A	2/14/2017
Northern Arapaho	No	12/1/2016 - Fee and docs requested 1/12/2017 - Fee and docs submitted 2/13/2017 - Cleared	N/A	2/13/2017
Upper Sioux Community of Minnesota	No	11/10/2016 - Fee and docs requested 1/10/2017 - Docs submitted 1/12/2017 - Fee submitted 2/13/2017 - Cleared	N/A	2/13/2017
Ho-Chunk Nation	No	1/10/2017 - Fee and docs submitted 1/27/2017 - Cleared	N/A	1/27/2017
Ottawa Tribe of Oklahoma	No	1/10/2017 - Fee and docs submitted 1/18/2017 - Cleared	N/A	1/18/2017
Northern Cheyenne Tribe	No	11/9/2016 - Fee and docs requested 1/10/2017 - Docs submitted 1/12/2017 - Fee submitted 2/2/2017 - Cleared	N/A	2/2/2017